

RISK MANAGEMENT FOR DENTISTS

**RISK
MANAGEMENT
FOR
DENTISTS**

Jack L. Mumme

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RISK MANAGEMENT FOR DENTISTS

Risk Management for Dentists

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(Adobe Acrobat version)

ISBN 910167-82-6

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RISK MANAGEMENT FOR DENTISTS

JACK L. MUMME

Jack Mumme was the founder of Akros Enterprises, Inc., a risk management/claim management company in 1971. During his 23 years as president, Akros handled over 20,000 medical, dental, and product liability claims. The company represented 200 hospitals nationwide, and several thousand physicians and dentists.

He was a member of Toastmasters International and made 300+ presentations and workshops for the American Hospital Association, Veterans Administration, International College of Surgeons, American Management Association, and numerous other organizations.

Jack appeared twice before the California Legislature on behalf of health care providers and has attended many settlement conferences, arbitrations, and mediations, as well as monitored numerous trials throughout the United States.

He produced nine video educational programs for physicians and hospitals, has written numerous articles on malpractice for magazines and newsletters, and appeared on Los Angeles television discussing the "Right to Die." Jack is a member of the National Writers Association and International Television and Video Association.

Mumme obtained a teaching credential through the University of California, Irvine, and taught insurance in two southern California community colleges for three years. He was chairman of the Education Committee for the Los Angeles Claims Managers Forum for three years.

He presently testifies as an expert on malpractice and insurance and acts as a consultant to law firms on malpractice and insurance. Jack presently resides with his wife in Coronado, California.

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Introduction

It seems to me there are five kinds of information that every dentist needs readily at hand:

- (1) a standard operating procedures manual
- (2) an OSHA manual
- (3) a personnel manual
- (4) a standard marketing procedures manual
- (5) some basic risk management guidelines

Our publishing firm, Dental Communication Unlimited, has the lead book in (1): either ***Standard Operating Procedures for Dentists*** or ***Standard Operating Procedures for Pediatric Dentists*** (plus four other specialties), all by Marsha Freeman.

Reece Franklin and I just wrote and I published (4), ***Standard Marketing Procedures for Dentists***.

Number 5 intrigued me, as much by its absence for dentists in book form as by the difficulty in finding a person sufficiently well versed to write such an important text so the entire staff could easily understand and apply it, written in straightforward and doable layman's language.

My answer came out of the blue. I keynoted a writing conference in Anaheim about a year back, and up from the audience when the talk ended came a stately, no-nonsense gentleman, clearly a veteran of something. A question led to a question, and in ten minutes I'd found Jack Mumme, who is the man that lawyers, insurance companies, or dentists most wanted in their corner when it came to almost all forms of risk litigation. I made some verifying phone calls a few days later, and I had found the real thing. this book is the result.

Dentists are extremely busy and want the facts fast, accurate and immediately applicable. They are experts in the mouth; business stuff comes second, and anything with the word "risk" attached to it (meaning lawsuits, insurance, safety, and a long string of other, dan-

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gerous sounding word) would, in a perfect world, always be moved to the bottom of the pile, never read or applied.

Alas, “the world ain’t perfect,” as somebody important must have said. And dentists know three things very well: (1) That an ounce of prevention, say in insurance, might save their hide, tools, and home on any future day, (2) that it isn’t whether a lawsuit will pop up in some server’s hand, but when, and (3) that a patient injured in the chair or falling face-first on the top step can lead to many sleepless nights and long, litigious days.

So my directions to Jack were just as straightforward:

- (1) Tell dentists the essence of what they must know about risk management.
- (2) Do it in words that every person in their office can grasp.
- (3) Where you must use legal or technical terms, explain them at the time and in a glossary.
- (4) capture the key points again in an east-to-apply chart or graph.
- (5) Cite legal cases when necessary, but no more.
- (6) Give us a quick reader that tells the how risk management as it applies to their practice.
- (7) Don’t lose us in the details. Point the dentists to the respective expert when they need help, like finding a specific insurance agent who can create the best combination of policies applicable to their local needs.

The only real difficulty we had with this book was deciding what should be discussed in which order. Everything with risk implications was important, and almost everything in a business where one party is physically handling another (not to mention the emotional and psychological ramifications) has risk implications. Even the employee farthest from the chair, even the parking lot, all had to be included. It was gathering gilded leaves from the ground and making a tree from them.

So we opted to ask first what risk management is, and why it is worth all this time and effort. Just whose assets are you trying to preserve? And in today’s tort-twisted environment, is that even possible?

Then precisely how do you protect yourself. Like insurance for you and comp for the employees – and where that didn’t work. “Who

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was an employee?” we asked, and just what rights did a dentist have anyway? What were the rules and guidelines; where were you safe?

That led to a much more specific chapter, “Risk Guidelines for the Dentist” where the need for accurate, current documentation and the proper selection of patients was highlighted. That’s right: it’s your choice who gets to use your service.

Managed care is a huge concern among dentists, so I asked Jack to share his thoughts on how one can protect their assets, more in legal than financial sense, in this still-evolving field.

What would risk management be without a safety program and a process for defining and responding to those accidents you couldn’t prevent?

We saved the most dreaded part for last: lawsuits. What to do, from the suspicion to the reality. Jack tells us what not to do: don’t cry and don’t take it personal. What you say and what you don’t say, what happens at each stage, how you are involved, and how experts can help.

There are other ways to resolve disputes, so a short explanation of arbitration and mediation provides a possible alternative plan that may be far faster and less costly.

Does litigation seem so far off that you’ll worry about it when it arrives? We hope that day never does. In the meantime, Jack shares ten actual dental cases, selected to represent a wide variety of situations, and he asks you to zero in on what happened in each, and why, to sharpen your sense of why patients take their dentist to court.

The book concludes with some sample letters you may wish to use to keep out of those courts and a glossary. With “search” features on your computer, an index wasn’t necessary in this version. The Table of Contents will get you quickly to your field of concern.

Jack provided a partial summary of the wider risk management concept for dentists in chapter 3, but let me broaden it here to some plain statements that, if tended to, will mightily lessen your risk. (The book tells how.)

1. Figure out what assets you have to protect and why you need risk management in your practice.
2. Determine what you must do now, what you must get others to do, and what your staff must do – and when.

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3. Get the right kind of insurance.
4. Define whether those working for and with you are employees or independent contractors, and react to each appropriately.
5. Become familiar with the basic tort laws.
6. Document, in writing, all aspects of care and treatment.
7. Obtain informed consent.
8. Discuss complications which may occur with your patient.
9. Develop an effective and comprehensive safety program.
10. Make sure your staff is well trained and interacts well and properly with your patients.

A final observation. I was struck a dozen times as this book came together how much of the work and prevention would be already in place if a dentist implemented either of our SOPs books. Particularly the job descriptions and the task inventory sheets, the detailed process checklisting for recordkeeping, almost all of the other elements of documentation, and the more thorough (and caring) interaction the staff would have with the patients.

That's enough introduction. Before beginning this chapter, Jack Mumme's biography appeared. I hope you read it. That's why I think he is precisely the right person to write this book. The words and thoughts that follow are his. (Alas, any errors or omissions in presenting them are mine!)

Gordon Burgett, Publisher
Dental Communication Unlimited

Chapter 1

What is Risk Management?

Risk Management for dentists has a three-part purpose:

1. To reduce liability exposure through loss prevention and loss control.
2. To assure proper and adequate insurance coverage.
3. To preserve assets.

Let's discuss each of these three, define the term "risk," look at the kinds of goals needed to define your particular risk management program, and identify additional reasons you need risk management.

Loss Prevention and Loss Control

Loss prevention includes

1. Establishing policies and procedures for identifying risk.
2. Preventing accidents and incidents that will create claims or law-suits against you, in part through the establishment and maintenance of a safety program.
3. Establishing guidelines that will help you select, train, and provide continued education for you and your employees.
4. Learning and following the state statutes and the business and professional codes that apply to the practice of dentistry.

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Loss control includes

1. Learning how to communicate with an injured patient so that the patient will not retain an attorney to sue you.
2. Establishing policies and procedures for immediately notifying your insurance company so they can settle a claim if there is liability.
3. Settling a claim before a suit is filed, to save expenses and possible time in court.
4. Keeping a claim for damages in line by helping your attorney negotiate a fair settlement, if warranted.
5. Assisting your defense attorney in selecting expert witnesses and preparing the defense of your case should the case go to trial.

Insurance Coverage

Risk Management assures that you have the right insurance program by helping you

1. Select the right agent or broker.
2. Select the right coverages for property and casualty insurance.
3. Select the right kind or professional liability policy.
4. Determine the proper limits.

Preservation of Assets

What assets do you want preserved? Usually

1. Your reputation.
2. Your dental license.
3. Your practice equity.
4. Your bank account.
5. Your home.
6. Your car.
7. Your retirement fund.
8. Other investments.

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9. Your baseball cards. Kidding of course, though when it comes to risk management such kidding is no laughing matter.

What Specifically is “Risk”?

Risk is defined as hazard, danger, peril, exposure to loss, injury, disadvantage, or destruction.

A bungy-jumper leaping off a bridge or tower takes serious risks, such as the cord being too long or breaking from the weight. Both have the same dire result: the jumper will hit the ground or water at full speed. A dentist sticking any kind of needle or tool into a patient’s mouth risks injuring a nerve, cracking a tooth, or breaking the patient’s jaw.

Life and dentistry are risky businesses. Risk management in either attempts to identify and either remove or lessen those risks. With insurance, it also helps compensate those affected should the risks nonetheless manifest themselves.

Goals

If you elect to have a risk management program, you must set goals.

Why? Because insurance companies will ask you if you have a risk management program and what goals you have set for yourself and your staff. (Sometimes just having the risk management program will lower the premiums you pay.) National accreditation organizations and managed care organizations will also want to know about your goals.

What might some of your goals be?

1. Reduce the potential of dental malpractice claims.
2. Develop procedures for assessing and identifying liability exposures.
3. Reduce actual or potential risk.
4. Develop a dental malpractice prevention program, particularly for new employees.

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5. Offer regular, updated safety and risk management programs to the staff.
6. Encourage continued education programs concerning safety and risk management.
7. Establish a claim program to assist your insurance company and your attorney in the defense preparation of a lawsuit.
8. Promote patient satisfaction.
9. Develop a patient education program.
10. Develop better documentation in the patients' records.
11. Keep better records when acquiring equipment, plus have better equipment maintenance records.
12. Maintain a "no-show" log.
13. Have your staff pay more attention to selecting patients.
14. Develop better informed consent procedures.

Other reasons you need to practice risk management

1. It is easier to attract qualified personnel when they know your practice is well organized and your risks are identified and being
2. It gives you peace of mind—you can sleep better at night not worrying how you are going to pay a judgment against you.
3. Your staff (and patients) will think better of you knowing you carry insurance to protect them.
4. Having proper safety programs and adequate insurance will help if you are audited or surveyed. This is particularly important to HMOs or other providers who will closely check all aspects of a risk management program.

Chapter 2

How Do You Protect Yourself?

Insurance

Insurance for dental malpractice, while not a risk management tool, is essential in carrying out the practice of dentistry in our present litigious society.

An insurance policy is a written contract. Shakespeare might have defined a contract as “a document of many pages filled with profound words and phrases full of sound and fury signifying nothing.” Alas, an insurance contract signifies a lot of important things to a dentist. You must be aware of what your policy covers and what it excludes.

The most important liability coverages for a dentist are:

1. **Personal Liability.** This covers you personally: your golf ball strikes a fellow duffer in the eye—or you inadvertently do the same with your umbrella.
2. **Business Liability.** A patient trips and falls on the carpet in your office.
3. **Professional Liability (Dental Malpractice).** Many examples will be given in this book.

Make sure that your broker or agent explains your coverage fully and in detail because much of the small print is not only hard to read, it’s hard to understand.

For instance, some companies issue policies that state that they will indemnify you for a loss. (Indemnify means “to receive reimbursement for a payment made to someone else.”) If your policy provides for indemnification, your company might say, “you pay the claim and we’ll pay you back.” A better policy will state that the insurance company will “pay on your behalf.” In the latter case, the company pays the claim and you don’t have to pay any money at all. Those are the kinds of details you should know.

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Many companies write Comprehensive General Liability policies that cover both personal liability and business liability, including (but not limited to) coverage on your automobile, boat, golf cart, etc.

Business liability coverages protect you for accidents occurring in your dental office(s), such as equipment falling and striking a patient or that patient who slipped and fell on your carpet.

Most general liability policies exclude professional liability claims (dental malpractice). It is often difficult to tell whether a patient fell because of the carpet or they were under the influence of anesthetics.

You should have your business liability coverage with the same insurance company that provides your professional liability coverage so there will be no dispute as to who handles a claim.

What about self-insurance?

Forget about it. It has been proven that an individual dentist can't possibly save enough money from his practice to pay the humongous amount an attorney will charge you for defending you and/or to pay a negotiated settlement or a large verdict.

Types of insurance companies

There are many different kinds of insurance companies. Let a agent or broker know that you are aware of that.

1. A **domestic insurance company** is the best kind for you. It is usually licensed in one or more states and is controlled by the state's insurance commissioner, who audits the companies to determine, in part, whether they have enough money in reserves to pay their claims. Domestic insurance companies must prove financial stability; in many states they must also post a bond.
2. A **non-admitted carrier** has authority to do business in a state but is less controlled than a domestic carrier.
3. A **captive insurance company** is usually put together by a group of people or companies that have a lot in common. Many large hospital groups and large medical clinics are insured by a captive insurance company. The group can only insure members that have

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something in common with the other members. If the captive insurance company's charter says they insure only physicians and hospitals, for example, they can not insure dentists.

4. **Offshore insurance companies** are usually domiciled on one of the Caribbean islands. The islands have insurance directors but they do not require a lot of capital and they do not usually conduct adequate audits to determine if the company has sufficient surplus or reserves.

Types of insurance policies

There are many types of insurance policies. Dentists should be primarily concerned about the following types of coverage.

1. **Property coverage.** Property coverages cover your building or office for fire, windstorm, etc., but standard policies do not cover earthquake or floods. Since dental offices have unique and costly equipment—dental chairs, x-ray machines, and laboratory equipment,—be sure that you advise your agent about the *replacement* cost of your equipment and furnishings.
2. **Liability Coverages**
 - (a) Personal liability. Your Home Owners or Renters Liability policy will protect you for personal activities such as injuring someone while skiing or your dog tearing up your neighbor's property. Your personal liability policy excludes all claims arising from your dental practice.
 - (b) General liability or Comprehensive. General Liability protects you for accidents that occur in your office or on your premises. But these policies exclude professional liability claims or lawsuits.
 - (c) Professional Liability Coverage. Your professional liability policy covers you for most claims arising out of your dental practice but it excludes intentional acts such as sexual molestation, assault and battery, etc.

To better understand your coverages, let's look at two kinds of accidents that are frequently reported.

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Water damage claims.

“Water, water everywhere and all the boards did shrink.”

The Ancient Mariner

The boards may not shrink but if you leave the water running in your dental equipment, it may well play havoc with your carpet and the carpet of the tenants below you in a multi-occupancy building.

Some serious water damage claims have been caused by dentists or their employees failing to turn off the water in the water receptacle used by the patients to spit out excessive saliva or mouth tailings after drilling or extraction.

Water running into a receptacle in which a piece of gauze, cotton, or Kleenex has been spit or left can, likewise, cause considerable water damage.

Appoint someone to make sure the water is turned off when the office is closed or the office below, in disrepair, will suddenly become the most beautifully decorated office in the entire building, paid for by you or your insurance.

Equipment-related accidents

If a needle or other instrument breaks during a procedure, the claim would be covered under your professional liability coverage. If a piece of office equipment falls and strikes a patient, the claim would be covered under your general liability policy. Patients often allege that the equipment fell when they bumped their head when standing up.

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Types of Professional Liability Policies

There are two types of professional liability policies for dentists: occurrence and claims made.

1. **Occurrence policies** provide the most favorable coverage. In an occurrence policy, the occurrence out of which a loss arises must happen during the time the policy is in force. Any claim resulting from that occurrence is covered (unless specifically excluded) regardless of when the claim is reported or discovered. In an occurrence policy, the fact that a claim may not become known or discovered until years after the policy period is over will not void coverage.
2. **Claims-made coverage** applies only to claims first made during the term of the policy. In other words, if a loss happens during that term, but the resulting claim is not reported until after the policy expires, the policy will not cover that claim.

You have the option to buy “tail” or “reporting endorsement” coverage from your new insurance company if you elect to change insurance companies. Discuss “nose” and “reporting endorsement” with your agent or broker.

Your insurance policy states, *not so clearly*, what the insurance company will pay for and what it will not pay for.

If you are a dentist who practices general dentistry, your policy will probably exclude:

1. The practice of oral or maxillofacial surgery.
2. Administration of general anesthetic.
3. Criminal acts such as assault and battery and sexual molestation, are excluded in most professional liability policies.

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NOT COVERED BY INSURANCE	
MORAL TURPITUDE	TYPE OF CLAIMS
Your insurance policy does not cover: Sexual harassment, sexual molestation, or assault and battery, i.e. manslaughter or murder.	Sexual Harassment Verbal conduct Physical contact Exchange of benefits for sexual favors
Your policy will not provide representation at Disciplinary Hearings.	Molestation Rape Vaginal exam by dentist Fondling breasts

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PREVENTIVE MEASURE	HANDLING A CLAIM
Written instruction about employees' rights	Notify insurance company even if coverage does not apply.
Affirmatively raising the issue of harassment	Ask for a written reply if company denies coverage.
Expressing strong disapproval	Retain an attorney to represent you immediately. These claims are serious and you do not want to say anything that would prejudice your right.
Developing appropriate sanctions	Start compiling a list of possible witnesses.
	Gather all notes, memoranda, letters, and all other documents that might apply to the claimant.
	Make sure your attorney is experienced in handling this type of claim.

Intentional Acts

Intentional acts are difficult to define. Every time a dentist sticks a needle in gum tissue or extracts a tooth he is performing an intentional act.

Some states prohibit insurance companies from insuring intentional or willful acts. For instance, California Insurance Code, Section 533.5, provides, (a) “No policy of insurance shall provide, or be construed to provide, any coverage or indemnity for the payment of any fine, penalty or restitution in any Civil or Criminal action or proceeding brought by the Attorney General, any District Attorney, or any City Prosecutor, notwithstanding whether the exclusion or exception regarding this type of coverage or indemnity is expressly stated in the policy.”

The prohibition in state statutes is to prevent persons insured under a liability policy from claiming coverage for murder, manslaughter, assault and battery, and sexual molestation.

There is often a question of coverage when the pivotal issue is whether a claim for malpractice based on the exploitation of the doctor/patient relationship which results in sexual activity during the course of treatment falls within the policy coverage of an insurer. Most courts have ruled that sexual activity is a departure from the standard of care.

Common risks covered by dental professional liability insurance include negligence, failing to obtain informed consent, libel and slander, and betrayal of professional confidence, along with many more allegations.

Workers Compensation Insurance

The Workers Compensation system is a state-created statutory practice created to compensate workers who are injured in the course and scope of their employment.

Physical injury or trauma causing mental or emotional injury is compensable in the workers compensation system in virtually all jurisdictions.

All fifty states have workers compensation laws but the specific provisions of the law vary in each state. We will give you some basic principals that apply in most states.

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Basic Guidelines

1. Make sure that all your employees are properly trained for the job they are doing.
2. Make sure the workplace is as safe as possible.
3. Make sure all employees wear proper equipment when necessary (and to comply with OSHA), such as
 - (a) gloves
 - (b) lead apron
 - (c) dosimeter
4. Perform a regular safety inspection of the office and working places. (See the checklist at the end of Chapter 5.)

History of Prospective Employees

You may not inquire into an applicant's workers compensation history before making a conditional offer of employment.

After making a conditional job offer, you may ask about a person's workers compensation history in a medical inquiry or examination that is required of all applicants in the same job category.

There are some recognized compensable diseases that are contracted by office workers.

1. Tuberculosis
2. Hypertension
3. Hepatitis
4. Respiratory disease
5. Heart disease

In addition, there are specific things you may or may not ask of potential employees. The EEOC provides clear guidance, as shown below:

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WORKERS COMPENSATION	
SCREENING EMPLOYEES	EMPLOYEE VS. CONTRACTOR
Screening employees	Employment Agreement vs. Contract
History of prospective employee	
Questions about: Arrest record Use of illegal drugs Drinking habits	Job description and skills inventory
	"Right to control" test
	Is employee taking out social security, unemployment insurance, etc.?
Licenses or certificates	
Important because: Responsible for vicarious liability	

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TYPE OF CLAIM	PREVENTIVE MEASURES	HANDLING A CLAIM
Exposure to nitrous oxide	Check valves for leaks	Notify insurance company immediately if employee is injured.
Disease Tuberculosis Hepatitis	Wear mask	
	Hand washing	
Exposure to: Radiation Needle stick Infection / open wounds	Calibration of radiation badges	If injury is serious, take employee out of service.
	Strict policy on handling needles and all sharps	Have equipment checked for gas leaks.
Sexual harassment		
Sexual molestation	Policy on amount to lift	Fill out Claim Report.
Injury from faulty equipment or instruments	Back support available	Make proper entry in employee's personnel record.
	No off-color remarks or touching by employees	
Falls—slipping on liquid		
Lifting—heavy cartons		Document calibration results.

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Equal Employment Occupation Commission (EEOC) Guidance on Pre-employment

1. An employer may ask whether an applicant can meet the employer's attendance requirements.
2. An employer can ask about licenses and/or certificates.
3. An employer can ask about arrest or conviction records.
4. An employer may ask questions about an applicant's impairments—an impairment is a disability only if it substantially limits a major life activity.
5. An employer can ask an applicant about current use of illegal drugs because an individual who currently uses illegal drugs is not protected under the American Disabilities Act.
6. An employer can not ask about lawful drug use.
7. An employer may ask about the applicant's drinking habits.
8. Employers may ask an applicant to submit to a psychological examination unless the particular examination is medical. Psychological examinations are medical if they provide evidence that would lead to identifying a mental disorder or impairment.
9. An employer can give an applicant a test to determine illegal use of controlled substances. (The test can not be considered a medical examination).

Nitrous Oxide Exposure

There are many dental patients who depend on some form of relaxation or sedation when they receive dental care. Nitrous oxide is considered to be the easiest, fastest, and safest method of providing that to a patient. There have been several retrospective studies of dental personnel and spouses of dentists that suggest that the chronic exposure to the gas can lead to problems, including spontaneous abortion.

Several studies of medical and dental personnel exposed to nitrous oxide suggest that when exposure is kept below 400 parts per million on a time weighted average there is little if any risk. (See Yagiela, J.A., Health Hazards and Nitrous Oxide, A Time for Reappraisal. *Anesthes. Prog.*, 1991; 38:1-11).

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A Reminder

Filing a workers compensation claim does not prevent an injured employee from filing a claim under the ADA (American Disabilities Act).

Clauses in state workers' compensation laws bar all other civil remedies related to an injury incurred in the course and scope of employment in which an employee receives workers' compensation benefits.

However, those clauses do not prohibit an employee from filing a discrimination clause under the EEOC (Equal Opportunity Employment Commission) or filing a suit under the ADA. The employee has to receive permission from the EEOC before a lawsuit can be filed.

Employee vs. Independent Contractor

The rule of thumb here is that if you are going to get sued, get sued for your own actions, not the actions of others. It is important to know the difference between an employee and an independent contractor because the employment relationship triggers obligations relating to unemployment insurance, worker's compensation, social security, wage and hour laws, OSHA, ERISA, and various federal and state tax withholding statutes. Employees can assert claims of employment discrimination and other employment-related causes of action relating to adverse employment decisions; contractors can not.

The definition of an "employee" under both the federal Americans Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 is as follows:

The term "employee" means an individual employed by an employer.
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The practice of dentistry has changed over the years and many dentists hire other dentists, dental assistants, dental hygienists, laboratory technicians, and others to assist them in their practice. Some dentists prefer to sub-contract their work to other dentists or health care providers.

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The definitions of “employee” and “independent contractor” vary depending on the particular employment statute being examined.

Because vicarious liability can make the dentist liable for the action of others, he/she should make sure of the relationship of the people selected to assist in their practice.

“Independent contractors,” by definition, are not employees and are not covered by most employment laws.

There are tests to determine if a person is an employee or an independent contractor, such as the Common Law “Right to Control” Test that follows.

Common Law “Right to Control” Test

This test is applied under the National Labor Relations Act. Significant rules are as follows:

1. The extent of control which, by the agreement, the recipient company or person retains the right to exercise over the details of the work;
2. Whether or not the person in question is engaged in a distinct occupation or business;
3. Whether, in the locality, the particular kind of work is usually done under the direction of the employer or by a specialist without supervision;
4. The skill required in the particular occupation or profession;
5. Whether the company or individual supplies the instruments, tools, and the place of work for the person doing the work;
6. The length of time for which the person has performed or will perform services;
7. The method of payment, whether by time or by the job;
8. Whether or not the work is part of the regular business of the company or individual;
9. Whether or not the parties believe they are creating an employment or independent contractor relationship, (This is particularly true if another dentist or hygienist is brought into the practice.) and/or
10. Whether the principal is or is not in the business.

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The Dentist and The Law

Many dentists have become so threatened (or intrigued) by the law they have attended law school and become attorneys. Some have given up their dental practices altogether to practice law while other dentists practice law part of the time.

That is important to you because if you are sued, there is a good chance that a dentist (or physician) will take your deposition or cross examine you in a trial.

Dental Malpractice

The law of dental malpractice falls under the general rules of tort law, in particular negligence. Torts are civil wrongs. Civil wrongs are generally compensated monetarily.

The words “malpractice” and “negligence” are sometimes used interchangeably but they do not necessarily confer the same meaning.

Negligence is based on the act or failure to act of a reasonably prudent person in a similar situation.

Malpractice is misconduct of a professional. Because of their education, training, and skill, a professional is not considered an ordinary, reasonable person and the professional has to be judged by experts. In malpractice lawsuits, dentists are indeed judged by experts.

For example, a dentist may be negligent (guilty of malpractice) in failing to use the customary and available diagnostic aids in making a diagnosis or administering treatment. Failure to use customary aids is often considered a deviation from acceptable standards, which are defined below. First we must understand a dentist’s liability.

Theories of Liability

Before a patient can sue a dentist, there must be a duty to the patient by the dentist. Before there can be a duty, there has to be a doctor/patient relationship. If you establish a doctor/patient relationship and breach the duty, the patient can sue you. It is not always easy to terminate a doctor/patient relationship and we will address the proper way to terminate that relationship later in this book.

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Standard of Care

Standard of care is a legal expression which defines the duty (responsibility) that a dentist must fulfill in care and treatment of a patient.

Most claims and lawsuits against a dentist allege that the dentist failed to meet a standard of care. The traditional description of the standard of care rule is

This duty requires that the dentist undertaking the care of a patient possess and exercise that reasonable and ordinary degree of learning, skill, and care commonly possessed and exercised by reputable dentists practicing in the same locality.

According to A.H. McCoid, “Good dental practice is the standard. It comprehends what the average, careful, diligent, and skillful dentist would do or not do in the care or treatment of similar cases.”¹

There is a difference among attorneys as to whether a dentist has complied with applicable standards. Some attorneys prefer to speak of “failure to comply” where other attorneys prefer to speak of alleged “violation of standard of practice.”

David M. Harney, a prominent Los Angeles plaintiff attorney, states “certain jurors may be reluctant to accept that a professional person has ‘violated’ a standard of his profession but the same juror may be willing to find a ‘failure of compliance.’”

Standards of care have been developed by:

1. Legislative acts.
2. Guidelines established or recommended by national organizations.
3. Court decisions.
4. Experts.

Standards vs. Guidelines

Some dentists, for economical or other reasons, have signed contracts with HMOs or large dental organizations to provide dental services to their members. HMOs and other organizations are furnishing dentists with guidelines as to what they can and can not do. In some cases,

¹ A.H. McCoid, *The Care Required of Medical Practitioners*, 12 *Vanderbilt L. Rev.* (19).

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dentists have to send x-rays or other documentation before they can receive authorization to treat a patient.

Practice guidelines may be defined as standardized specifications for medical-dental care developed by formal process that incorporates the best scientific evidence of effectiveness with expert opinion.

1. It is important that practice guidelines be developed by a process that requires the consensus of all practitioners involved in the care of a given condition, rather than a process that is imposed on practitioners by outsiders.²

Most business problems require common sense rather than legal reference. Don't substitute common sense or your own knowledge gained from experience for a practice guideline.

Practice guidelines should make allowance for the risks of a procedure, for differing degrees of severity of the condition, and for a co-morbid condition.³

2. Practice guidelines should not attempt to prescribe every facet of the care of a patient.⁴
3. In a court case, *Wickline v. State of California*⁵, a physician was guided by HMO guidelines or other instructions. The court ruled that ultimate responsibility for medical decisions in a patient's care lies with the physician.

Standard of Care is usually the element of the cause of action that generates the most common controversy in malpractice litigation.

The patient must show that the dentist owed him or her a duty and that the dentist breached that duty.

The treatment of practice guidelines, as evidence, varies from jurisdiction to jurisdiction, but in general they will be used in conjunction, or as species of, expert testimony.

² Leape, L.L., Practice Guidelines and Standards. *Quality Review Bulletin*, Feb. 1990.

³ Ibid.

⁴ Eichhorn, J.H., *Journal of the American Medical Association*, 1986.

⁵ 192 Cal. App. 3d 1630, 228.

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Specialist v. General Practitioner

Specialists are held to the standard of care ordinarily exercised by other specialists in the same field of dentistry. Accordingly, a general practitioner's conduct is analyzed by the standard of care exercised by other prudent general practitioners.

In the event that the general practitioner attempts a specialist's diagnosis or treatment, his or her conduct is first evaluated by whether or not a reasonable general practitioner, taking into such factors as the patient's mental and emotional condition, would render such care.

For instance, if a general practitioner extracts a wisdom tooth that is very difficult to extract and he experiences a fractured jaw, the general dentist would probably be held to the standard of an oral surgeon.

When a general practitioner invades a perceived area of dental specialization, in acts or words, a lawsuit can occur. Many specialists do not want general practitioners practicing in their specialty field without the proper training or skills. Some are eager to testify in court when that happens. Attorneys have even challenged the credentials of dentists based on the advertisements they ran in the "Yellow Pages" of a phone directory.

Later in this book we list some court decisions related to the practice of dentistry. In one of those cases, *Parker v. Kentucky Board of Dentistry*, 818 F.2d 504 (6th Cir. 1987), the court ruled that a general dentist could use the words, "orthodontics," "braces," and "brackets" in his advertisement.

The Don'ts of a General Practitioner

Don't do root canals.
Don't do crowns.
Don't do bridges.
Don't do orthodontics.
Don't do windows.

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Your Rights

In spite of all the don'ts, all dentists have some rights. You have the right to:

1. Choose your patients.
2. Make decisions about the clinical management of your patient.
3. Refuse to perform any procedure or treatment if it is not considered in the best interest of the patient.
4. Act in the best interest of the patient when consent cannot be obtained.
5. Discontinue a therapeutic relationship with a patient.
6. Request a second opinion if necessary.
7. Keep personal and confidential records.
8. Expect adequate payment for services rendered.

Informed Consent

Think of informed consent as a “hat rack” and you will not forget it.

Many jurors do not understand the technical or scientific aspects of a dental malpractice case.

Jurors do understand informed consent and if they want something to “hang their hat on” so they can award something to the plaintiff, they will make an award based on lack of informed consent.

Having a dental assistant get your patient to sign a consent form is not adequate informed consent.

The essential elements of informed consent are:

1. The diagnosis—tell the patient about the nature and extent of their dental problems—caries, where and how many, periodontal disease, extractions, etc.
2. The proposed treatment.
 - A. Give the name of the procedure.
 - B. Describe what you are going to do in layman's terms.
3. The risk associated with the treatment.
4. Alternative treatment, if any.

A dentist is required to obtain a patient's express or implied consent for treatment. Failure to do so will subject the dentist to bat-

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tery—harmful or offensive touching of another person, either intentionally or unintentionally.

If a dentist obtains consent of a patient to perform one type of treatment or procedure and subsequently performs a substantially different treatment for which consent was not obtained, again there is a clear case of battery.

The issues of consent arise in these contexts:

1. Total lack of consent.
2. Failure to adequately explain a procedure and risk so that the patient's consent is informed.
3. Performance of an additional, separate procedure or completely different procedure from the one for which consent was given.
4. Extension of a procedure beyond its proper bounds.
5. Performance of a procedure contrary to the patient's express wishes.

The use of forms, other printed material, diagrams, and audio visual material are useful but are not a substitute for the doctor/patient interaction.

If a dentist is confronted with a patient who is unable to give valid informed consent—such as a minor, a person who is mentally ill, or who has another type of impairment,—they should obtain the consent of a surrogate, such as a family member or a court-appointed guardian.

Battery

Battery is defined as “harmful or offensive touching of another person, either intentionally or as a byproduct of some other intentional wrong.”

Battery to a health care provider is extremely important because some state laws prohibit insurance companies from insuring intentional acts and most liability insurance policies specifically exclude coverage for *assault and battery*.

When case law establishes “the law” in one state, other states often apply that law when determining liability or damages in a case being tried in another judicial district.

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California has established some specific case law with respect to battery.

In *Valdez v. Perry*, (1993) 35 Cal. App. 2d 485,491, the court established the law that where a person has been subjected to an operation without his consent, such operation constitutes technical assault and battery.

In *Cobb v. Grant*, (1972) 8 Cal. 3d 229, the Supreme Court explained that a doctor's failure to obtain the patient's informed consent can give rise to two different causes of action: negligence and battery.

The court also held that where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery.

In 1987, the California Legislature enacted Code of Civil Procedure, Section 425.13 which limited the use of punitive damage claims in medical malpractice cases.

Simply, a doctor should not go beyond the procedure or treatment they discussed with their patient.

As a preface to another example, Dr. J. Cotter, a child psychiatrist at the Menninger Foundation said, "sometimes it is necessary that a child be permitted to gradually and frequently make the choices he is ready to make, but also learn to accept and tolerate restrictions where necessary."

A dentist did not believe a child should be permitted to make a decision gradually when he told the judge, "I slapped him because he would not turn loose of my finger and I was sure he was going to bite my finger off."

Neither the dentist nor the child's mother could get the young boy to turn loose of the dentist's finger, so the dentist slapped him. The boy then released the dentist's finger.

The boy's parents sued the dentist for assault and battery. The judge dismissed the case. Off the bench he told the dentist, "I would have slapped him too if he had bit my finger and would not turn loose."

Some actions such as placing a towel or hand over a child's mouth to gain the child's attention and cooperation are probably not

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battery. In some cases it is essential for a dentist to employ physical restraint for the benefit of his patient and himself.

A dentist does have some options in treating an uncooperative patient. He or she can give medication to sedate the patient. Nitrous oxide is the usual analgesic of choice or the patient may be hospitalized for general anesthesia. Talking to patients is sometimes not enough.

Comparative Fault or Contributory Negligence

If a dentist clearly injures a patient, it is easy to place the blame. However, a patient's actions can also cause or exaggerate an injury.

If a dentist prescribes a regime of antibiotics after he extracts a patient's tooth, the patient fails to follow orders and does not take the antibiotics as prescribed, and the patient develops an infection, the patient can be held guilty of contributory negligence if he or she files a lawsuit against the dentist alleging malpractice.

In some jurisdictions, the judge or jury can reduce the verdict for damages by the percent of the patient's negligence. For example, if a jury awards \$50,000 in damages and the judge finds the plaintiff was 50% at fault, the judge can reduce the verdict to \$25,000.

Breach of Contract

The best way to avoid a lawsuit for breach of promise is to not guarantee anything. It has been said that the practice of dentistry is not a science but an art. So the total fulfillment of a guarantee is often beyond your control.

Very few lawsuits are filed against dentists for breach of contract. Unless a dentist actually guarantees his/her services and the patient can prove that the dentist guaranteed the work, it is difficult to prove breach of contract.

Statements like "you will be better" may have some therapeutic value but some patients may consider this as a guarantee or promise.

Intentional Misconduct

Intentional misconduct occurs when someone, acting deliberately, does something that hurts another person or damages that person's

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property. The law does not require that the person intended to cause the injury that he or she actually inflicts, only that he/she acted deliberately.

The most common form of intentional misconduct in professional liability is the touching, molesting, or raping of a patient or employee.

Courts have held that pelvic examinations or examination of the breast for swollen glands is unrelated to proper dental practice.

In a few cases, female patients have experienced sexual dreams or hallucinations while under the influence of certain types of anesthesia. Therefore it is recommended that dentist have a female employee present when administering anesthesia.

Keeping in mind that a dentist can be held liable for the acts of employees, the dentist must be fully aware of what constitutes sexual harassment because he/she can be held liable for a partner, an associate, or an employee, should they be so charged.

Definition of Sexual Harassment

California and some other states have regulations that state sexual harassment includes:

1. Verbal conduct, including epithets, derogatory comments or slurs, or
2. Physical conduct, including assault, impending or blocking movement, or physical interference with normal work or movement, or
3. Visual harassment, such as derogatory posters, cartoons, or
4. Sexual favors, including unwanted sexual advances, conditioning an employment benefit on an exchange of sexual favors.

Examples of Sexual Harassment

1. Unwelcome sexual conduct reasonably interfering with an employee's job performance or creating an intimidating, hostile, or offensive working environment;
2. Communication of suggestive or obscene letters, photographs, notes or invitations;
3. Use of sexually patronizing terms such as "honey," "doll," or "babe," especially after being told that the terms are considered of-

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- fensive (keeping in mind that what some employees consider flattery, others find objectionable);
4. Posting of sexually suggestive or degrading pictures, drawings, photographs, calendars, pinups, or cartoons (featuring either sex);
 5. Communication of offensive sexual jokes, slurs, insults, innuendoes, or comments (including graphic or verbal commentaries about an individual's body or sexual activities and sexually explicit or degrading words used to describe an individual);
 6. Unwelcome sexual conduct that is sufficiently pervasive to alter the conditions of employment and create an abusive working environment;
 7. Offensive gestures (including attempts to look inside an employee's clothing);
 8. Questioning an employee about his or her sexual history or sexual practices;
 9. Any demand or suggestion by the employer's agent or supervisor that a supervised employee engage in a personal relationship with that employer, agent, or supervisor, or with a client or customer outside of the context of the business;
 10. Any offensive touching (i.e. touching that would be found offensive under the circumstances by a reasonable person);
 11. Any hazing or initiation rituals that have a sexual component;
 12. Requiring an employee to wear sexually suggestive clothing (particularly if the employee complains that he or she is receiving unwelcome sexual advances as a result of that clothing).

The employer will be deemed to have knowledge of the wrongdoing unless it can be established that the employer took reasonable steps to prevent the harassment.

Those steps include:

1. Affirmatively raising the issue of harassment;
2. Expressing strong disapproval;
3. Developing appropriate sanctions;
4. Informing employees of their rights and instructing them on how to raise harassment claims, and;
5. Developing methods to sensitize every one at the workplace to the problem.

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Many state dental codes provide for disciplinary action against a dentist who has been guilty of crimes involving moral turpitude. As explained in the next section, sexual misconduct on the part of a dentist would probably fall within the definition of a wrong involving moral turpitude.

Sexual molestation, rape, and sexual harassment claims and lawsuits are not covered under standard liability insurance policies. Nor do most insurance policies provide insurance for the cost of defending a disciplinary proceeding or for payment of a civil fine resulting from disciplinary proceedings.

Disciplinary Proceedings

A dentist's license to practice is probably his/her most important asset. Therefore, it is in their best interest not be reported to the State Board of Dental Examiners for any reason.

Most dentists are reported to dental boards for allegations involving moral turpitude. Moral turpitude has been defined as "anything done knowingly contrary to justice, honesty, or good morals."

Sexual misconduct on the part of a dentist is one of the most frequent complaints made to the "boards." Sexual misconduct falls within the definition of a wrong involving moral turpitude.

Disciplinary proceedings are conducted in accord with the rules applicable to the administrative hearing and are much more informal than lawsuits that are governed by rules of the judiciary.

Most dental boards do not need a subpoena to obtain a patient's records or any other documents in your office that pertain to a particular patient. However, boards can and do subpoena records when necessary.

Board investigations, in most states, are not subject to review unless a lawsuit is filed. Most lawsuits that involve the suspension or revocation of a dentist's license are filed by the State Attorney General's office. In other words, if someone has filed a complaint with a dental board against a dentist, and the board is conducting an investigation, the patient or the patient's attorney can neither obtain a copy of the report nor review the report until a lawsuit had been filed.

This procedure protects the dentist if a complaint is unfounded.

Other Legal Concerns

This book does not presume to discuss all of the legalities as they pertain to dentists and dentistry. It is your obligation to remain informed about the existing law, plus new laws, as they pertain to your profession. The best way to do so is to read your specific professional journals, attend continuing education classes, and keep informed of regulations of similar professions.

Another example shows why it is important to keep well informed.

There is the issue of Vicarious Liability, in which a dentist can be held vicariously liable even though he is otherwise without fault. The most common doctrine imposing vicarious liability is known as *respondent superior*, in which the wrongful acts of an employee resulting in injury to a third party are imputed to the employer.

For example, under the laws of all but three states, a dental hygienist may only practice under the supervision of a licensed dentist. Dentists not only have the right to control the activities of the dental hygienist working under the dentist's supervision but also the duty to supervise the professional activities of the hygienist.

Chapter 3

Risk Guidelines For Dentists

Complete and thorough records are essential for risk protection. They should not be limited to a dentist's clinical skills. They should be kept for every case and should address the following:

1. Records that clearly state what was done and when it was done.
2. Records which establish that nothing was neglected and that the given care fully met the standard demanded by law.
3. Records that would be acceptable when offered as evidence in court.

If any patient discontinues treatment before he/she should or if the patient fails to follow instructions, the record should show that fact.

1. You should write to the patient and file a copy of any letter sent to the patient advising them against any unwise course.
2. The dentist should care for every patient with scrupulous attention to the requirements of good dental practice.
3. Destructive and unethical criticism of the work of other dentists should be avoided.
4. The dentist should exercise tact, as well as professional ability, in handling his patients. A proper professional manner should be maintained at all times, both toward the patient and toward the patient's family.

The attentive dentist may early sense some unsatisfactory and disturbing undercurrent. By the institution of protective measure, he may prevent the situation from developing into something much more unpleasant. Thus, if the patient is dissatisfied or complaining or if the family's attitude indicates dissatisfaction, consultation should be demanded. The use of a consultant affords, in any case, great protection against a claim or lawsuit.

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The consultant may also be a good expert witness in the event of litigation.

1. The dentist should be careful to avoid making any statement constituting, or any which might be construed as, an admission, or may be damaging to the defendant dentist even though it was made to a third party, rather than to the patient, and even though it was made before trial. Such an admission may also be made by an agent or employee during the course, and within, the scope of the employee's employment.
2. The dentist should refrain from over-optimistic prognosis and should avoid promising too much to the patient.
3. The dentist should keep inviolate all confidential information.
4. The patient must not be abandoned. The dentist/patient relationship should be legally and ethically terminated. (See sample letters in the appendix.)
5. The dentist should advise the patient of any intended absence from the practice and should recommend, or make available, a qualified substitute.
6. The dentist should arrive at an understanding in matters, particularly when the question of excessive fees or charges contributes to an unavoidable element of risk.

Dental Records

As stated, dental records are one of the most important and basic aspects of communication.

Dentists often overlook the patient's medical history. A health history must be taken and it must be adequate to let the dentist know of the patient's past and present condition.

The dentist can exercise the best judgment concerning diagnosis, prognosis, treatment, or choice when a complete history is obtained. The history must be updated at or immediately after each visit. It is devastating to a dentist during a deposition when a lawyer says something like, "It is not recorded in your records that your patient had suffered from endocarditis," or "it is not in your records the patient suffers from diabetes."

If the dentist replies that the patient did not tell him, the next question will be, "Did you ask?"

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Most dentists do obtain a dental history but in many cases it is not complete.

As well, a dentist has the obligation to tell the patient precisely what he expects to do before he starts dental care and treatment. The patient must comprehend that information and give permission to do the work. This includes the dangers inherent in the prescribed treatment as well as the dangers of non-treatment. An example of the latter: “If you don’t have a root canal and crown, you will eventually loose that tooth.”

Many lawsuits are started by what the dentist says—or doesn’t say.

“Didn’t the other dentist tell you that you have serious periodontal disease?”

You must indicate in the patient’s chart the periodontal condition of the patient. Normal conditions should also be so noted with pocket depths recorded in all areas of the mouth. The chart should indicate any bleeding or other pathology.

Comments about tooth mobility, vitality, occlusion, and endentulousness should likewise be charted. The findings of pathological lesions should include a record of the findings, location, appearance, size, physical character, and distribution.

Make sure your records indicate that you advised the patient about the lesion. Document in the patient’s chart via a letter referring the patient to a specialist and put the subsequent pathology report in the patient’s file. Caries, periodontal support, periapical lesions, unerupted teeth, and other pathology observed on x-rays should be noted in the chart. An entry might read, “X-rays interpretation has occurred and all pathology has been recorded. Normal conditions have been noted.”

Records on Dentures

According to the California Business and Professional Code, Section 1706, “Every completed upper or lower denture fabricated by a licensed dentist, or fabricated pursuant to the dentist’s work order, shall be marked with the patient’s name or social security number, unless the patient objects. The initials of the patient may be shown alone, if use of the name of the patient is not practical.

The dentist shall retain the records of those marked dentures and shall not release the records to any person except to law enforce-

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ment officers, in the event of an emergency requiring personal identification by means of dental records, or anyone authorized by the patient.” (Check to see if your state has a similar statute.)

Corrections

Many lawsuits have been lost because records have been altered, entries have been deleted, or corrections have not been made in the proper manner.

Try not to make corrections in the records; however, if it is necessary to correct or make a change in the records, do it properly.

If an error is written or typed in the record, draw a single line through it, note the date and time of the correction, then initial that correction.

Never use “white-out.” Cover up the entry with ink or tear it out of the records.

If you make a correction in the record that the plaintiff’s attorney can not make out, he will always allege that you have attempted to conceal something. He will attempt to convince the jury that you are guilty of fraud and that none of your testimony is trustworthy.

Never make additions to the records after a suit is filed. Notes to your defense attorney are considered privileged information so if you think of something important that you forgot to include in the patient’s chart, write a confidential memo to your attorney and he will advise you how to handle the information at the time of your deposition or at the time of trial.

Keep in mind that it often takes several years for a malpractice case to reach trial. Memories fade, people lie, witnesses die, but the dental records must always be available.

Always keep your records up to date because you don’t know when a patient will become disenchanted and some attorney will serve a subpoena on you requesting your records.

It may seem like a nuisance to you to make an entry in the chart that a female employee was present when you examined a female patient, but that is extremely important to note, particularly if you administer an anesthetic. A sexual familiarity lawsuit is difficult to defend without a witness. Failure to make a simple entry in a chart can cause a dentist a great deal of grief.

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Access to Dental Records

The dental records belong to you, not the patient. The patient does have an interest in the records and should have access to them.

Dental records are confidential documents and access should be restricted to the patient or the patient's authorized representative, including the patient's attorney. The confidentiality of dental records has been established by statutes in some states.

If the patient requests that you release their records, protect yourself and make sure the patient has signed an authorization to release those records. The authorization should indicate that the records are being released to the patient or an authorized representative of the patient.

Under any circumstances, do not release your original records or x-rays. If and when a third party requests your records, with proper authorization, advise them that they can copy your records and x-rays but you will not release the originals.

The plaintiff can demand that you produce the original records or x-rays at a deposition or trial but you and your attorney can make sure that no documents are removed from the records and that no changes are or have been made.

If a judge or plaintiff's attorney asks that the original records and/or x-rays be introduced as evidence, the defense attorney can make a motion with the court asking that the records be returned to you at the conclusion of the trial.

Communication

Communication or the lack of communication is probably the biggest single cause of malpractice claims and lawsuits.

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IMPROPER RECORD KEEPING	
CONSEQUENCES	PREVENTIVE TECHNIQUES
Failure to obtain proper history	Take a good history.
Doing wrong procedure/ extraction	Document tooth by name and location as well as by number.
Failure to document informed consent	Show what was done and when it was done.
Administering wrong anesthetic	Document non-compliance.
Administer wrong medication	Comment on condition of gums as well as teeth.
	Instruct on dangers of non-treatment.
	Protect x-rays.

ONGOING MEANS OF CHECKING	HOW TO HANDLE CLAIMS
Ask patients if they are satisfied with treatment.	Do not release original records or x-rays.
Send a letter of inquiry if patient does not or is not going to return.	Make sure to have proper authorization to release records.
Concurrent chart reviews.	Do not alter records.
	If corrections are necessary, make corrections in proper manner.
	Keep records secured if claim or lawsuit is filed.
	Get records reviewed by an expert.

Will You Listen?

“I know you think you understand what you think I said, but what you heard is not what I meant.” This familiar expression too often sums up the relationship between a dentist and a patient.

Make sure you listen and understand what the patient tells you about his/her problem. Make sure the patient understands what you tell him/her about what you are going to do and what kind of results you expect—do not be over-optimistic and make the patient expect too much.

If you have an outside interest, do not discuss it with or in front of a patient.

A patient who developed a complication after an extraction was asked in a deposition why she sued the dentist. She said, “I heard him say that at the present time he was more interested in getting a flag-pole painted at the post office building he owned than he was in his dental practice.” He told the patient that he owned several post office buildings that he leased to the government. The patient said she could have cared less about his buildings, she was interested in her tooth-ache.

Don’t refer to your dental assistant, your dental hygienist, or your secretarial staff as “girls,” i.e., “I’ll let the girls finish up.” They are professionals and a patient does not want to believe you are assigning any part of their treatment to a “girl.”

Compassion

Compassion is defined as sympathetic consciousness of others.

Dentists know or should know that many patients are sincerely frightened about having dental work performed. Some actually break into tears when confronted with going to a dentist.

“The value of compassion cannot be over emphasized. Anyone can criticize. It takes a true believer to be compassionate. No greater burden can be born by an individual that to know one cares or *understands*,” says Arthur H. Stainback, D.D.

Compassion should become a very important part of your practice. It can also help avoid lawsuits.

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Let the patients know, not only by what you say but by the tone of your voice, that you understand and you are concerned about their apprehension. Be a good listener.

Risk Management Guidelines

Do not confuse risk management guidelines with practice guidelines. There is a big difference.

We have discussed practice guidelines elsewhere in this book. Some risk management guidelines are:

1. Become familiar with the basic tort laws.
2. Define your role and responsibilities.
3. Document, in writing, all aspects of care and treatment.
4. Obtain informed consent.
5. Discuss complications which may or do occur. (Do not admit mistakes—any admissions will be admissible in court.)
6. Make sure your staff is well trained and interacts well with your patients.
7. Have a good safety program.

Personnel

Claims or lawsuits often start in the front office. The way your receptionist or office staff greet patients is extremely important. First impressions are created within 30 seconds so your risk management program should start with the personnel in your office that greet patients.

A good plaintiff's attorney will often take the deposition of a receptionist or other office personnel before he takes the deposition of the defendant dentist. Why? The attorney wants to find out how you operate your office. How do you treat your employees? How do you treat your patients on both a personal and professional level?

The attorney believes that your personnel, under stiff questioning, may volunteer information that he may not get from you.

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Evaluating Patients

You should not attempt to diagnose or treat every patient that walks into your office. A skills inventory may help you determine how much help you are going to get from your employees in evaluating people that come into your office.

Both you and your employees should know something about identifiable psychological problems. Specifically, patients who share these traits in their history or clinical records:

1. Noncompliance
2. Under or unemployed
3. Request controlled substances
4. No-shows
5. Failure to pay or acknowledge billing

Selection of Referrals

Because of the growing complexity and the use of new technology in dentistry, doctors are increasingly referring patients to specialists.

Referring a patient to another dentist does not let you “off the hook.” You might be subjected to “negligent referral.” The “deep pocket” theory gives lawyers an incentive to file suit against anyone who participated in the care and management of the patient, directly or by referral.

Make sure you know the credentials of any dentist used for referral, including the specialist’s experience in their particular field. It is difficult to prove negligence of a referring dentist but if the specialist harms the patient, you might be named as a co-defendant. If named as a defendant, you would have to prove that you referred the patient in good faith.

Job Description v. Skills Inventory

Marsha Freeman’s *Standard Operating Procedures for Dentists* discusses teamwork through diversity.

A good job description for all employees is, or should be, a part of your team plan. It would inform each employee exactly what he or she is supposed to do.

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Attorneys are very interested in how you select your personnel to carry out those duties. They are also interested in what you tell your employees what their duties are.

It is the tactic of some lawyers to serve a Subpoena Duces Tecum (see the glossary for further definition of terms used in this book) on your office and request copies of your job descriptions and the skills inventories of the personnel who assist you in your practice.

A job description tells what duties an employee is suppose to carry out. A skills inventory tells whether the employee has the education, training, and skill to carry out those duties. For example, a dental assistant's job description may state that the assistant will assist the dentist in administering nitrous oxide. The skills inventory will explain the training that person has received in administering nitrous oxide. Both are of vital interest to an attorney.

IMPROPER SELECTION OF PATIENTS	
CONSEQUENCES	PREVENTIVE TECHNIQUES
You fail to rule out the following type of patients:	Written list
Non-compliant	Instructions on "how to question"
Under or not employed	Written questionnaire
No-shows	Reading body language
No pay	

ONGOING MEANS OF CHECKING	HOW TO HANDLE CLAIMS
Staff meetings	Proper documentation in charts
Chart reviews	Letter to patient putting them on notice
No-show ledger	Letter terminating the doctor/patient relationship
Feedback from bookkeeper	

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Anesthesia

Some state legislatures have passed laws that establish the standard of practice in dentistry. Those laws vary but the California Business and Profession Code, Section 1646-1648.8, provides a good example of how the administration of anesthetics is controlled.

1646.1:

A dentist must possess a license to practice and hold a valid general anesthesia permit before he can administer or order the administration of general anesthesia on an outpatient basis for dental patients. No dentist shall order the administration of general anesthesia unless the dentist is physically within the dental office at the time of administration.

This article does not apply to the administration of local anesthesia or to conscious patient sedation.

1646.3:

Any dentist holding a permit shall maintain medical history, physical evaluation, and general anesthesia records as required by board regulations.

1646.7:

Any violation of any provisions of this article constitutes unprofessional conduct and is grounds for the revocation or suspension of the dentist's permit, license, or both.

Chapter 4

Managed Care

Webster's dictionary defines "management" as (1) to handle or direct with a degree of skill, (2) to make and keep submissive, and (3) to exercise executive, administrative, and supervisory direction.

HMOs and other health care administrative organizations like the definition "to exercise executive, administrative, and supervisory direction."

Dentists do not want to accept the definition, "to make and keep submissive." You should not be too submissive with people or organizations when they attempt to tell you how to practice dentistry.

There are many definitions of care. The following are just a few definitions from Webster's dictionary:

1. Painstaking or watchful attention.
2. Anguished uncertainty of fear of misfortune or failure.
3. To give care to the sick.
4. To feel interest or concern.
5. Great concern connoting either thoughtful or hovering attentiveness toward another.

HMOs and other health care organizations usually show great concern and will hover with attentiveness over a dentist until the contract is signed.

Managed care has just about swallowed up fee-for-service practice in the medical profession. Only about 25% or 30% of dentists are now associated with some form of managed care. Many dentists believe the dental profession will be swallowed up by managed care like it has swallowed the medical profession.

How a dentist chooses to practice dentistry is like choosing a religion—it is a very personal decision.

There are many "pros" and "cons" about whether a dentist should participate in a managed care program.

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The American Dental Association can furnish you with numerous publications that can assist you in making a decision about whether or not you want to participate in managed care. Some of those publications are:

A Dentist's Guide to Managed Care Marketplace Information
Managed Care Resource Packet
The Antitrust Laws in Dentistry
Understanding Your Dental Benefits Plan
Selecting a Dental Benefits Plan: A Guide for Employers

There are other free publications available from the ADA Council on Dental Benefit Programs; Call (312) 440-2746. You can request the following publications:

Alternative Dental Benefit Models: Their Design and Impact on Your Practice
PPOs Offering Dental Plans
HMOs Offering Dental Plans
Individual Practice Associations and Dentistry
Offering a Dental Benefits Plan, Direct Reimbursement: Tailor Your Own Employee Dental Benefit Plan
Designing a Dental Benefits Plan

The Accreditation Council that accredits HMOs, PPOs, and other health care organizations described managed care as:

“Managed Care refers to the coordinated attempt to control health care cost through a variety of strategies and methodologies. The basic strategies and methodologies address utilization of services, the prices paid to providers and the price paid by the user. Managed care strategies include risk management, utilization management, prior authorization, concurrent review, limitation of benefits, peer practice review, service coordination, channeling, bundling, and preventive and health promotions.”

Many members of the ADA believe it should take a stronger stand against managed care.

ADA has very good reasons for not being more aggressive in opposing managed care. The ADA does not want to encourage lawsuits against the ADA or any of its members.

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The Federal Trade Commission's Bureau of Competition has investigated and brought a wide variety of lawsuits that involve the dental profession. For example:

1. **American Dental Association**, 94 F.T.C. 403 (1979) (consent order) (modified 100 F.T.C. 448 (1982) and 101 F.T.C. 34 (1983)). The ADA agreed not to restrict its members from truthfully advertising or soliciting business. The consent agreement settled complaint charges that the ADA illegally engaged in concerted action to restrain competition among its members by adopting and enforcing provisions in its code of ethics that unreasonably prevented or hindered its members from soliciting business by truthful advertising, or similar means.
2. **Iowa Dental Association**, 99 F.T.C. (1982) (advisory opinion). The Commission advised a dental association that its proposal to institute a peer review program to aid the cost containment efforts of third-party payers and assist patients in the resolution of fee-related disputes with dentists by providing voluntary, non-binding guidance in disputes, would not violate the antitrust laws unless the programs were used as a price-fixing mechanism or as a means of coercion. The Commission cautioned, however, that if the programs were used for anti-competitive purposes, it could raise serious antitrust concerns. For example, the Commission pointed out that one form of anti-competitive conduct would be the use of peer review to "discipline" dentists for advertising.

MANAGED CARE	
HMOs	GUIDELINES PUBLICATIONS BY ADA
HMOs and other organizations will exercise executive, administrative, and supervisory direction.	Dental Guide to Managed Care
Administrative organizations will attempt to move or keep you submissive.	Marketplace information
Care: To show great concern and attentiveness, they will hover over you until the contract is signed.	HMOs offering Dental Plans
You are entitled to due process if	HMOs offering Dental Plans

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organizations challenge your credentials.	
	PPOs offering Dental Plans

DEALING WITH COMPETITION	PROVISIONS OF CONTRACTS
COURT DECISIONS:	WATCH FOR:
1. ADA can not restrict truthful advertising or solicitation of business.	1. Hold Harmless Agreement
2. Dental organization could not withhold patient's x-ray.	2. Indemnity Agreement
3. General practitioner could use words "orthodontics" and "braces" in advertisement.	3. Contract Fee Schedule
4. Dental Association could not limit dental coverage to the least expensive course of treatment.	4. Predetermination
	5. Unbundling of Procedures

3. **Association of Independent Dentists**, 100 F.T.C. 518 (1982) (consent order). An association of dentists in Pueblo Colorado agreed, among other things, not to restrict its members from truthfully advertising. This agreement settled a complaint that the association had illegally restrained competition among its members by adopting and enforcing a bylaw that prevented or hindered its members from truthfully advertising any aspect of their practices without the prior approval of the Association's Board of Directors.
4. **Indiana Federation of Dentists**, 101 F.T.C. 57 (1983), rev'd 745 F. 2nd 1124 (7th Cir. 1984), rev'd, 476 U.S. 447 (1986). The Supreme Court reversed the Seventh Circuit and affirmed the Commission's holding that an organization of dentists illegally conspired to obstruct third-party payers' cost containment programs through the concerted withholding of patient's x-rays.
5. **California Dental Association**, D9259 (complaint issued July 9, 1993; initial decision issued July 17, 1995; Commission opinion and Order issued March 25, 1996). The Commission's opinion affirmed an ALJ's decision finding that the California Dental Association's rules violated Section 5 of the FTC Act by unreasonably restricting truthful, non-deceptive advertising. The Commission

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- found that CDA's price restraints were per se illegal, and analyzed CDA's non-price restraints under a quick look rule of reason, setting out certain elements as guidelines for such analysis. The order requires CDA, among other things, to cease and desist from restricting truthful, non-deceptive advertising, including truthful, non-deceptive superiority claims, and offers of discounts; to remove from its Code of Ethics any provision that include such restrictions; and to contact dentists who have been expelled or denied membership based on their advertising practices and invite them to reapply. The order also requires CDA to set up a compliance program to ensure that its constituent societies interpret and apply CDA's rules in a manner that is consistent with the order.
6. **Louisiana State Board of Dentistry**, 106 F.T.C. 65 (1985) (consent order). A state dental board agreed not to restrict truthful advertising. The consent agreement settled a complaint that the Board had engaged in unlawful concerted action to restrain competition by restricting dentists from truthfully advertising the prices of their services, particularly discounts. Under the order, the Board may adopt and enforce reasonable rules, including affirmative disclosure requirements to restrict false, deceptive, or misleading advertising within the meaning of the state law.
 7. **Parker v. Kentucky Board of Dentistry**, 818 F. 2nd 504 (6th Cir.1987). The Federal Trade Commission filed a Brief as Amicus Curiae in the Parker case where a dentist challenged the constitutionality of the Kentucky Board of Dentistry's advertising restrictions, which allowed the Board to prohibit the use of terms such as "orthodontics," and "braces," and in advertisements by a general dentist, the Commission filed an amicus brief arguing that such advertisements were not misleading and, therefore, could not be prohibited by the state under the First Amendment. The Commission also argued that there are strong public policy reasons for allowing truthful advertising by professionals, and that unnecessary restrictions on such advertising hinder competition as well as the flow of useful consumer education. The court ruled that the board's outright ban was unconstitutional.
 8. **Hawaii Dental Service Corp.**, 106 F.T.C. 25 (consent order). A corporation that offered a dental insurance plan, which provided dental services for a prepaid premium and was operated by the dentists who provided the services, agreed to cease conditioning its

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decisions to send new dentists to certain counties in Hawaii on the approval of member dentists already practicing in those counties.

This agreement settled complaint charges that the corporation had limited competition among dentists in the state by enacting by-laws that prohibited the corporation from recruiting and sending dentists to certain counties without the approval of the majority of its members residing in the affected counties.

9. **Texas Dental Association**, 93 F.T.C. 392 (1982). A dental association agreed to cease obstructing third-party payers from the pre-determination and limitation of dental of dental coverage to the least expensive course of treatment and to cease coercing payers to modify dental care coverage plans. The agreement settled complaint charges, similar to those in IFD, that the association had orchestrated member dentists' withholding of x-rays from insurers who needed them to make benefit determinations.

Do you have to be careful about discussing managed care with your patients? Yes!

The lawsuits discussed above should make dentists wonder what they can do without fear of legal concerns.

Dentists who choose not to join a managed care group or association can discuss with their patients why they prefer to use a fee-for-service type of practice.

During World War II, the government adopted a slogan, "A slip of the lip may sink a ship." A slip of a dentist's lip in saying the wrong thing about managed care can get him sued. You do not want to say things like, "A managed care company does not provide quality care." An inappropriate criticism can open the door to lawsuits for business torts on claims ranging from defamation, libel, and slander to wrongful interference with existing or prospective business relationships.

You have to stop and think of how you would react if people were making false statements or starting unfounded rumors about your practice.

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MANAGED CARE CONTRACTING

Contract

A contract is a legally enforceable agreement between two or more individuals or entities that confers rights and duties on both parties.

Dentists should be familiar with at least two contracts that involve dentistry.

1. Contracts between a dental benefits organization and an individual dentist to provide dental treatment to members of an alternative benefits plan. These contracts define the dentist's duties both to beneficiaries of the dental benefits plan and the dental benefits organization and usually define the manner in which the dentist will be reimbursed.
2. Contracts between a dental benefits organization and a group plan sponsor. These contracts describe the benefits of the group plan and the rates to be charged for those benefits.

Other Definitions

Hold Harmless Agreement. Most contracts have a provision in which one party to the contract promises to be responsible for liability incurred by the other party. Hold harmless agreements frequently appear in the following contexts.

Contracts between dental benefits organizations and an individual dentist often contain a promise by the dentist to reimburse the dental benefits organization for any liability the organization incurs because of dental treatment provided to beneficiaries of the organization's dental benefit plan. This may include a promise to pay the dental benefit organization's attorney fees and related cost.

For instance, if a dentist administers negligent treatment—such as a general dentist using undue force in extracting a tooth and fracturing the patient's jaw—jury finds the general dentist guilty of malpractice because he did not meet the standards of an oral surgeon, and awards a verdict against the HMO of which the patient is a member. If there is a hold harmless agreement and an indemnity clause in the contract between the individual dentist and the benefits organization,

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the organization can collect any money they paid to the patient in damages and the cost of defense.

Indemnity. The obligation or duty resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit.

Contract Dentist. A practitioner who contractually agrees to provide services under special terms, conditions, and financial reimbursement arrangements.

Contract Practice. Dental practice in which an employer or third-party administrator contracts directly with a dentist or group of dentists to provide dental services for beneficiaries of a plan.

Contract Fee Schedule Plan. A dental benefits plan in which participating dentists agree to accept a list of specific fees as the total fees for dental treatment provided.

Dental Service Corporation. A legally constituted, not-for-profit organization that negotiates and administers contracts for dental care. Delta Dental Plans and Blue Cross and Blue Shield Plans are such plans.

Dental Benefits Organization. Any organization offering a dental benefits plan. Also known as dental plan organizations.

Preferred Provider Organization (PPO). A formal agreement between a purchaser of a dental benefits program and a defined group of dentists for the delivery of dental services to a specific patient population as an adjunct to a traditional plan, using discounted fees for cost savings.

Health Maintenance Organization (HMO). A legal entity that accepts responsibility and financial risk for providing specified services to a defined population during a defined period of time at a fixed price. An organized system of health care delivery that provides comprehensive care to enrollees through designated providers. Enrollees are generally assessed a monthly payment for health care services and

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may be required to remain in the program for a specified amount of time.

Predetermination. An administrative procedure that may require the dentist to submit a treatment plan to the third party before treatment is begun. The third party usually returns the treatment plan indicating one or more of the following: Patient's eligibility, guarantee of eligibility period, covered services, benefit amounts payable, application of appropriate deductibles, co-payment, and/or maximum limitation. Under some programs, predetermination by the third party is required when covered charges are expected to exceed a certain amount, such as \$300.

Unbundling of Procedures. The separating of a dental procedure into component parts with each part having a charge so that the cumulative charge of the components is greater than the total charge to patients who are not beneficiaries of a dental benefits plan for the same procedure.

New Developments in Managed Care

Enrollments. Prudential Dental Managed care has announced that enrollments have nearly doubled since 1992. The primary reason, according to Prudential, is the growing popularity of dental managed care options. Plan enrollments grew from some one million in 1992 to more than two million in 1996.

Some 4,000 physicians and dentists in California have joined labor unions to protect their interests in the face of spreading managed care companies, according to a *New York Times* report.

Court Action: A federal judge sided with Blue Cross and Blue Shield of Alabama in a ruling described as a victory for managed care companies that limited patient's choices of doctors. The executive director of the Alabama Dental Association, part of a coalition of medical groups that opposed Blue Cross in court, said the ruling means patients will be unable to see a doctor of their choice.

South Carolina and Tennessee are attempting to pass Freedom of Choice bills in their legislature that would allow patients in a managed care program to have access to treatment by non-participating

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providers. The Tennessee bill applies only to dental patients and providers.

California and New York are considering “any willing provider” bills. Both allow any provider willing to meet the terms and conditions in the geographic service area to apply for credentials and enter into agreements with a managed care company.

Upset over contracts terminated for no reason or reasons not understood by the provider, many states are considering some type of due process protection before a health care provider could be dropped from a plan.

With greater penetration of managed care, risk management principles become more important.

Dental Plans are Becoming More Selective

HMOs and other organizations are being more selective of providers. The organizations are being sued for negligent selection or retention of providers.

Negligent selection claims are based on vicarious liability. A patient will claim that the “organization knew or should have known that an individual dentist did not have the proper credentials to carry out a certain specialty treatment.”

Credentialing of dentists is necessary because of state statutes and national accreditation standards.

National accreditation standards require that managed care organizations have written policies and procedures for the credentialing process that include original credentialing, recredentialing, recertification, and/or reappointment of physicians and other licensed independent practitioners who fall under its scope of authority and action.

Due Process

What if the credentialing body or organization tells a dentist he does not have the proper credentials and he is terminated from a dental plan?

Under a California case, *Delta Dental Plan of California v. Banasky*, 33 Cal. Rptr. 2nd 381 (Cal. Ct. App. 1994) a dentist does have the right to challenge his termination. Dental plans that control impor-

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tant economic interests must afford participating dentists “fair procedures” for appealing their decisions. This recognized a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations which control important interests and citing cases affording rights in connection with adverse recommendations based on quality of care reasons in hospital medical staff situations. The basic ingredients of fair procedure include notice and a hearing.

A health care organization can terminate a dentist for cause.

If a dentist fails to meet all the provisions of his contract, that would be grounds for termination. These are often provisions of a dental contract:

1. Failure to follow guidelines.
2. Failure to carry required professional liability coverage.
3. Failure to meet standards of practice, etc.

Chapter 5

Safety Program

No office is too small to have a safety program.
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Sample Safety Policy Statement

Accident prevention and efficient service go hand in hand. Employees at all levels have a responsibility for safety, health, and well-being of all patients and visitors. This responsibility can be met by working together continuously to promote safe work practices, observing all rules and regulations, and consistently maintaining property and equipment in a safe working condition.

For this reason this office has established a safety program and encourages the participation of all personnel.

Operation of the Program

Employee Selection and Training

Selection and safety training of employees is an important part of a safety program. These steps might be part of your safety program:

1. Interview to determine the potential employee's attitude, work history, and accident history.
2. Confirm past training and certification or licensing.
3. Contact previous employers.
4. Provide new employee orientation about the job, office, building, and grounds.

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SAFETY PROGRAM	
COMPONENTS	SPECIFIC AREAS
Provide new employees with orientation and continuing education	Radiological equipment Radiation measuring device
Report incidents, potential and actual claims	Handling and use of nitrous oxide, including valves and meters
Management responsibilities	Floors vacuumed & mopped daily
Employee responsibilities	Plumbing: check flow of water and possibility of stoppage
Conduct safety survey	Containers for needle disposal

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SAFETY PRECAUTIONS	HANDLING INSTRUMENTS AND EQUIPMENT
Hand washing policy	Used needles and other sharp instruments shall not be sheared, bent, recapped, or re-sheathed.
Sanitizing equipment	As soon as possible, after use, disposable syringes, needles, scalpels, needles, and other sharp items shall be placed in puncture-resistant containers.
Gloves should be changed after gloves contact lead aprons	Reusable instruments and other devices shall be cleaned and disinfected.
Wearing radiation measuring devices, when necessary Procedure for discarding items and waste Dental hand-pieces, needle holders, forceps, lights, which might have been contaminated with blood, shall be decontaminated with appropriate disinfectant	
Disinfect contaminated work surfaces	

5. Provide periodic continuing in-service programs for all employees about safety and accident reporting.
6. Encourage employee awareness of loss prevention, loss control, and safety. Invite employee suggestions for implementing and improving a safety program.

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Accident or Maloccurrence Investigation

Not every accident or maloccurrence should be reported to your insurance company. Use common sense in protecting your accident history.

To someone not familiar with claims or claims procedures, it is often best to think in terms of a maloccurrence rather than a claim.

Maloccurrence is an all-encompassing term and is not limited to dental malpractice or professional negligence. It includes unfortunate accidents that occur during injections or extractions, accidents or incidents that occur on the premises like trips and falls, and loss of personal property. It also includes complaints about billing, allegations of discrimination, or liable and slander.

1. All injuries and maloccurrences should be investigated by the office manager, dental assistant, or the dentist to determine the cause and recommend how the hazard can be eliminated or remedied.
2. All potential and actual claims should be reported to your insurance company.

Definitions

Incident: An incident is an occurrence that is ordinarily thought of as a normal or routine event. It may be a trip and fall accident without injury. An incident may not necessarily involve a visible injury or any injury at all.

Potential Claim: A potential claim is an incident that will place the dentist or the office in a position that may result in an actual claim or lawsuit.

Actual Claim: An actual claim is when a patient or visitor indicates that, in his/her opinion, something has gone wrong and they should be compensated by way of money, waiver of a bill, etc.

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Management Responsibilities

1. Train and retrain all employees, new and old, in the safest way to do their job and point out where hazards exist.
2. Promote safety awareness and encourage a proper safety attitude by example and personal contact.
3. Take prompt corrective action whenever unsafe actions are observed.
4. Thoroughly investigate the cause of all accidents and take corrective action to prevent their reoccurrence, whether or not there is an injury. The dentist, office manager, or other duly authorized person must investigate and complete a report on every accident.
5. Conduct frequent safety inspections of all work areas and operations in order to improve housekeeping and eliminate unsafe practices.

ACCIDENTS	
LOCATION	TYPE OF ACCIDENT
Detail Location: Front walk near curb	Tripped on sprinkler head
Front stairway two steps above middle landing.	Tripped on worn carpet
In dental chair	Reaction to anesthetic
Dental office	Water damage from overflow of water from bowl on dental chair

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PREVENTIVE MEASURE	ACTION TAKEN
Advise gardener to replace of all bent sprinkler heads.	Called gardener. Documented details as related by patient in patient's chart.
Will replace carpet.	Offered to send patient to E.R. for exam.
Take better history and test for reaction, if any.	No signs of visible injury documented in patient's chart.
Post small sign advising patient not to spit out cotton or gauze into dental bowl.	Discontinued anesthetic. Call patient's spouse for transportation.
	Followed up the next day with telephone call. No further reaction.
	Turned off valve controlling water.
	Called plumber
	Called insurance company
	Will call contractor

EQUIPMENT	
INSURANCE COVERAGE	PURCHASE AND/OR MAINTENANCE
General Liability vs. Professional Liability	Keep all purchase orders or other records of purchase.
Circumstance determines if General Liability Company or Professional Liability carrier will handle claim.	Keep all guarantees and warranties.
Loss of income from First Party coverage	Keep maintenance ledger.
	Maintain service manuals.
	Keep ledger on type, model, serial # and when purchased.

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MALFUNCTION	PREVENTIVE TECHNIQUES	HOW TO HANDLE CLAIMS/ EQUIPMENT
Document type equipment	Proper training in use of equipment.	Take equipment out of service.
Type / kind of malfunction	Document on Skills Inventory amount of training on all types of equipment.	Tag and secure equipment for proper identification of the equipment involved.
Preserve evidence	Keep maintenance ledger: 1. When checked 2. By whom 3. Repairs - if any	Do not attempt repairs yourself Call insurance company. Will they have equipment inspected by technician or forensic engineer.
Document in patient's chart	Cleaning and Sterilization Record:	Notify distributor or manufacturer.
Do not release equipment to manufacturer or distributor	1. How 2. When 3. By whom 4. Name of sanitizing chemicals 5. By heat—length of time	Do not release to distributor or manufacturer.
How equipment is sterilized if sterilization is necessary		Make entry in maintenance ledger.
Remove equipment from service immediately		
Do not tear down equipment		
Secure for inspection by proper authorities		

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Employees' Responsibilities

1. Follow instructions. If you're not sure about rules, ask the dentist or an authorized person for safe job instructions.
2. Correct unsafe conditions or report them to the supervisor.
3. Keep work areas clean and orderly at all times. Poor housekeeping causes accidents and wastes time.
4. Use only prescribed equipment and do so in a safe manner.
5. Report all accidents to the supervisor immediately.
6. Wear proper protective equipment when necessary: gloves, goggles, apron, etc.
7. Avoid engaging in horseplay.
8. Avoid distracting others.
9. Obey all safety rules and practices and take an active part in the safety program.

Safety Survey

The basic goal of a survey is to assure a safe environment for employees, patients, visitors, invitees, and others who enter upon the premises. It presumes that you are regularly complying with your OSHA requirements and following the mandated regulations.

A survey will help cut down the frequency of accidents, incidents, and injuries that can result in a claim, lawsuit, workers compensation claim, and lost time from work.

Please realize the survey sheet that follows is merely a sample or basis for developing a comprehensive survey check sheet that is specific to the needs of your practice.

RISK MANAGEMENT FOR DENTISTS

Safety Survey Form

DATE OF SURVEY _____ SUPERVISED BY _____

Code: S=Satisfactory U=Unsatisfactory

1. Floor surfaces are clean and well maintained. _____
2. Floor surfaces afford secure footing and are free of cracks, holes, or tears. _____
3. Aisles are sufficiently wide to provide easy movement. _____
4. Stairs are clean and free of chips or cracks. _____
5. Employees clean up all foreign material or liquids from the floor immediately. _____
6. Hand rails are provided and are securely fastened. _____
7. All stairs have non-slip surfaces. _____
8. Stairwells and hallways are properly illuminated. _____
9. Furniture and fixtures are free of splinters or sharp edges. _____
10. Desk and file drawers operate easily. _____
11. Castered furniture is easy to move. _____
12. All electric cords, plugs, switches, and receptacles are in good repair. _____
13. All electric cords, plugs, switches, and receptacles are safely placed. _____
14. All operators of equipment have been properly trained. _____
15. Scissors, knives, pins, and other sharp items are safely stored and used. _____
16. All employees have been properly trained in the use of fire extinguishers. _____
17. There are adequate fire extinguishers of the proper type and size available in this area. _____
18. Rags and other cleaning materials are kept in closed metal containers. _____
19. Storage areas are kept clean, orderly, and closed. _____
20. Heating elements such as coffeemakers and portable electric heaters, are properly wired, safely placed, and on regular maintenance schedule. _____
21. A person is assigned to make sure appliances are turned off at the time of closing the office. _____
22. A person is assigned to make sure all running water is turned off at the time of closing the office. _____
23. Defective or inoperable equipment is reported immediately. _____
24. All power outlets are of the approved type. _____
25. Glass containers are not placed on high shelves. _____
26. Materials are handled to prevent breakage, spillage, or tipping hazards. _____
27. Burned out lights and tubes are replaced immediately. _____

Chapter 6

WHAT TO DO WHEN YOU GET SUED

Don't cry and don't take it personal.

The patient believes that he or she is suing a big insurance company or a profession. They don't believe they are suing an individual. Once the patient starts thinking about suing, they start thinking in terms of money, not personalities.

There are many steps to filing and prosecuting a lawsuit:

1. The patient must have a cause of action or, at least, a presumed cause of action before he/she can file a lawsuit against you.
2. The patient has to file a complaint and summons with the proper court. The court the plaintiff chooses depends on the amount of damages they are asking for. In some jurisdictions if the plaintiff asks for \$25,000 or less, they will have to file in Municipal Court. Most malpractice lawsuits are filed in a Superior or District Court because the plaintiffs usually ask for more than \$25,000.

Complaint

A Complaint is usually the first set of pleading filed in a lawsuit. The plaintiff/claimant states what he/she believes to be the facts in the case. Under modern court rules the purpose of the Complaint is to explain to the adversary the basis of the lawsuit.

Summons

A Summons is an official notification to the defendant by the court that a complaint has been filed against him and that he is required to appear in court on the day named to answer the complaint.

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LAWSUITS	
WHEN YOU GET SUED	THINGS YOU CAN DO
You will be served with Summons and Complaint.	Preserve but do not alter records.
	Don't give up original records or x-rays.
You will probably be asked to give a Deposition.	Cooperate with your insurance company and defense attorney.
You will be asked to produce records.	Help defense attorney select a good expert(s) to represent you.
You will be asked to answer Interrogatories.	Read all depositions and experts' reports to you will be prepared to handle any adverse comments.
You will probably be served with either: 1. Regular Subpoena 2. Subpoena Duces Tecum (Bring Record)	
You will be asked to give testimony, under oath, in court.	

EXPERTS ARE TESTIFYING ABOUT	ALTERNATIVES TO TRIAL
Implants	ARBITRATION
Electronic anesthesia	MEDIATION
Electronic x-ray D3-D imaging by spiral ct.	These procedures are less formal than a civil trial. Depending on Arbitration Agreement, you may be able to file a lawsuit if you are not happy with the outcome of the arbitration.

To “appear” does not mean that you have to make a personal appearance. It does mean that you or your attorney must give a written answer to the complaint within a specific time, usually 20 to 30 days.

Do *not* leave the Summons and Complaint on your desk or put them in a file. Send them to your insurance company or the designated defense attorney immediately. Send the documents via certified, re-

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ceipt requested mail so that you will have evidence that you forwarded the documents in a timely fashion.

If the Complaint is not answered in the time allotted, the plaintiff can take a default judgment. A default judgment means *you lose!* A default judgment gives the plaintiff an opportunity to prove his case without going to trial. Default judgments can be set aside by the court but it runs up the cost of the lawsuit.

The Summons and Complaint can be served by mail. Do not accept their service by mail or sign a document that says you have received the documents.

Most service is done by a process server. Do not discuss the case with the process server but do note on the face of the Summons and Complaint the date and time you received it, plus that process server's name.

In some jurisdictions the process server does not have to hand the Summons and Complaint to you personally. The server can serve someone in your office who tells the server they have authority to accept service or the server can serve a person that in all probability will make sure the defendant receives the documents.

If you have partners or colleagues that practice or are associated with you, do not accept service for them. Your partners or colleagues may have reasons they do not want to be served.

Discovery

After the Summons and Complaint have been served and answered, the attorneys usually start discovery.

Discovery is a set of procedures by which each side in a lawsuit may obtain pertinent information from the other. The most common discovery procedures are interrogatories and depositions.

Interrogatories

Questions! Questions! Questions! You will think the plaintiff wants to know what you had for breakfast.

Interrogatories are a pretrial discovery procedure in which written questions are propounded by one party and served on the defendant or plaintiff. The party served with the interrogatories must answer by written replies made under oath.

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While interrogatories are not as flexible as depositions (which include the opportunity of cross-examination), they are regarded as a good and inexpensive means of establishing important facts.

Do not depend on your memory for answering all of the questions. Refer to your records and give as much information as possible from those records.

Avoid answering questions that ask for your professional opinion.

If you do not understand a question, do not try to answer it.

Ask for assistance from your insurance adjuster or your defense counsel in answering what you consider tough questions. Depend on your attorney to answer all questions of a legal nature.

You have only a limited time to answer the questions so answer them promptly and return them to your defense attorney.

Depositions

More questions!

Depositions are another form of discovery in which you or other witnesses testify under oath in response to questions from the plaintiff or defense lawyers.

Your attorney can also ask you questions to clarify answers to some of the questions asked by the plaintiff's attorney.

Depositions are usually conducted much like court room proceedings, complete with a court reporter and cross-examination by opposing lawyers. However, depositions normally take place outside the courtroom and without a judge present.

The purpose is twofold: in part to discover information and in part to have the testimony available on record in case a witness is no longer available when the trial is held.

Preparation for Deposition and/or Trial

Take your deposition seriously. You are testifying under oath and your testimony has the same weight as if you were testifying in court.

You know dentistry so don't let your defense attorney call all of the shots. Insist that your attorney meet with you several days before

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your deposition is taken. Don't agree to meet in the hallway or conference room 30 minutes before you give your testimony.

If you learn in the early stages of your case that your attorney has not done his homework and doesn't know anything about dentistry, ask your insurance company to appoint another attorney to defend you.

If you have confidence in your attorney, pay attention to what he/she has to say. If he/she objects to a question by the plaintiff's attorney, don't say, "Don't worry, I know the answer." Your attorney is objecting because the other attorney has asked an improper question or has phrased the question improperly.

Remember the deodorant commercial that said, "Don't let them see you sweat"? That is very good advice for a dentist involved in a malpractice lawsuit. It is natural to be nervous before a deposition or before you testify in court, but proper preparation should make you feel much more comfortable.

Suggestions when you testify

1. Be bold when you take the oath and let everyone know you are paying attention to the proceedings.
2. Don't act cocky or obnoxious.
3. Avoid becoming emotional. If the attorney asks you personal questions that might upset you, remain calm.
4. If you don't know an answer, say so.
5. Be certain that you understand the question. If you don't understand the question, ask that the question be repeated.
6. Avoid exaggerating to make a point.
7. Avoid arguing with either attorney.
8. Avoid pausing so long after each question that you appear to be making up an answer.
9. Answer only the questions being asked. Do not volunteer information.
10. Speak in a loud, clear voice so the judge or jury can easily hear and understand you.
11. Avoid talking about the case in the halls or restrooms. A juror or investigator may be present.

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12. End important points of fact with the statement, “That is all I recall at this time.” Leave the door open to provide more information later, if necessary.
13. If the plaintiff’s attorney asks with whom you have discussed the case, if you have discussed the case with your attorney, state that you have. When asked if your attorney told you what to say, tell the plaintiff’s attorney that you were told to tell the truth.

Subpoenas

Subpoenas are part of the discovery or trial procedures. There are two kinds of subpoenas.

1. A **regular subpoena** directs a witness to appear and give evidence in a deposition or in a court proceeding.
2. A **subpoena duces tecum** is a subpoena requiring a person served not only to testify but also to produce documents, records, or other physical evidence. For subpoenas to be valid, they must be served personally on the witness and within a reasonable length of time before the date set for the hearing. If served with a subpoena, contact your attorney or insurance adjuster immediately.

MICRA

The Medical Injury Compensation Reform Act was enacted in California in 1975 to give relief to health care providers because malpractice premiums had increased as much as 50 to 75 per cent and many insurance companies refused to write malpractice insurance.

Jury verdicts were getting so far out of line that many doctors were giving up their practices.

Many states have now adopted similar or even more rigid statutes to protect doctors and hospitals.

The California Act contains the following provisions:

1. Mandates a \$250,000 cap on non-economic damages such as pain and suffering.
2. Provides for a sliding scale limit on attorney’s contingency fees. Fees are limited to 15% of all awards over \$600,000.

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3. Mandates periodic payments of future damages. Loss of income and other special damages can be paid out over a long period of time.
4. Allows introduction into evidence of any collateral source of payment. If the patient/claimant has received money from other sources such as a payment from insurance or another defendant in the case, the defendant can take credit for the money received.
5. Requires a 90-day "Notice of Intent to Sue." The patient/claimant has to notify you that he intends to sue you. You have an opportunity to start an investigation before a lawsuit is filed.
6. Allows health care providers to include arbitration provisions in their contracts.

If you are not sure about similar laws in your state and their applicability to dentists, contact your insurance agent, broker, insurance company, or the local bar association.

Damages

Damages refer to a sum of money asked for by a plaintiff or awarded by the court in a civil action, to be paid by the defendant because of the wrong that gave rise to the lawsuit.

General or **compensatory damages** are losses which can be proven to have been sustained and for which the injured party should be compensated, such as medical expenses, loss of earnings, and pain and suffering.

Punitive damage compensation can be awarded in excess of the actual damages. It is a form of punishment. Actual damages must exist before exemplary or punitive damages will be found, and then they will be awarded only in instances of malicious and willful misconduct. (Assault and battery are one form of willful and intentional misconduct.)

In determining whether punitive damages are proper, the court will consider:

1. The nature of the wrong.
2. The character of conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.

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5. The extent to which such conduct offends a public sense of justice and propriety.

Insurance policies provide coverage for compensatory damages but most policies exclude coverage for punitive damages.

The cap on “pain and suffering” has helped reduce the amount of verdicts in malpractice claims but attorneys now attempt to build up the claim for loss of earnings.

Loss of earnings also means the loss of earning power. In other words, if the injury prevents the plaintiff from earning compensation in the future, the plaintiff can be compensated for that future loss of earnings.

Experts

An expert is sometimes defined as “anyone with a briefcase who is over 50 miles from home.” These credentials would not be sufficient in a dental malpractice case.

In a dental malpractice case, the alleged facts can be obscure. It is difficult for a layman to make a reasonable determination in a malpractice case and therefore expert guidance is necessary.

We urge all dentists to participate in selecting the expert(s) who will testify on their behalf. Do not leave the selection up to the defense attorney. If the attorney makes a recommendation, look at the expert’s credentials and make sure that you feel comfortable in working with the expert selected.

Make sure that you review all expert reports and depositions so you will be acquainted with the testimony of the experts of both the defense and plaintiff. You want to make sure that you can handle any adverse testimony.

There are many cases that have held that in order for the plaintiff to recover in a malpractice action, he or she must present expert testimony relative to the standards and skill of members of the profession in good standing in the locality.

Finally, the expert must have special knowledge of the subject about which he/she testifies.

What experts are testifying about

Here are some areas that experts are currently testifying about.

1. **Implants.** Experts are testifying that some dentists are performing implant procedures without proper training or experience. Guidelines for the use of dental implants were issued by the Harvard-National Institute of Health, National Institute of Dental Research, Consensus Development and Technology Assessment Conference in 1978.

Whether these guidelines have been updated, dentists will be held to the current, prevailing guidelines as they pertain to implants.

Common criteria have not been used by implant authors to judge success and failure. For instance, what implants are recommended? Superiosteal or blade implants?

2. **Anesthesia.** Experts are challenging the training and experience of dentists who are administering certain kinds of anesthesia. Does the dentist have the proper certificate required by some states? Is a CRNA (certified nurse anesthetist) administering anesthesia in the dental office and what are the CRNA's credentials? If a CRNA does, or did, administer the anesthesia, did the dentist countersign the CRNA's entries in the patient's chart to indicate that he approved of the entries? Who is doing the pre-anesthesia physical examination? What type of emergency equipment was available, if any?

3. **Electronic Anesthesia.** Are you familiar with electronic anesthesia? Should you be? Do you use the "3M Patient Comfort System"?

Patients who fear needles, those who are allergic to injections or nitrous oxide, and people who want to avoid numbness after treatment are requesting different kinds of anesthesia when they know it is available. If electronic anesthesia is available and you don't use it, will experts criticize you?

4. **Electronic X-ray.** Will digital radiography become a standard? Dental x-rays are generally considered safe and it is rare that a pa-

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tient develops a complication from x-ray exposure. But what if one of those rare patients does suffer from a radiation complication and an expert testifies that computerized digital x-ray systems were available, will the plaintiff be able to prove that using general x-ray procedures was below standard? Probably not at the present, since it is still in the experimental stage and is used by a majority of your peers. But in the future?

5. **Panoramic and Periapical x-rays.** Periapical x-rays are used for diagnosing specific conditions on or around a tooth, such as cavities or bone loss caused by periodontal disease. This type of x-ray is more common and may become a standard.
6. **3D Imaging By Spiral Ct.** is not the standard but it is only one of the many reasons a dentist practicing general dentistry should refer his/her patients to a specialist when he/she recognizes that those patients have a very unusual dental problem.

Chapter 7

ALTERNATIVE DISPUTE RESOLUTION

What does Alternative Dispute Resolution mean to a dentist? Alternative Dispute Resolution means settling a claim without going to court. The two principal forms of ADR are arbitration and mediation.

Arbitration

Arbitration is a process where parties of a controversy submit their dispute to one or more arbitrators.

Parties to arbitration select their own arbitrators. The claimant selects an arbitrator, the defendant selects an arbitrator, and the two arbitrators agree on a third arbitrator, a referee.

In some states arbitration is compulsory. Some arbitration agreements are binding. If you lose your case in binding arbitration, you can not file a lawsuit. In other contracts, the agreements are not binding and the losing party can both appeal the decision and file a lawsuit.

Arbitration clauses have been upheld by the courts; it is very difficult to break an arbitration agreement.

At the present, arbitration is usually the most popular form of alternative dispute resolution because many health care providers have contractual agreements with client/patients.

In many jurisdictions the courts have mandated arbitration of cases up to a given amount, usually \$50,000. However, California, Florida, and Texas legislatures have mandated mediation as a way of settling disputes, including dental malpractice cases.

In settlement conferences, a judge usually makes an award. In arbitration, the arbitrators make the award. In mediation, the parties themselves agree on the amount.

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Advantages of Arbitration

1. Arbitration will almost always be resolved in a more timely fashion than a court action.
2. Attorney fees are usually lower than in litigation because it takes less time to prepare a case. Evidentiary rules are also less burdensome.
3. Arbitrations are more private. Sensitive information is not widely disseminated because hearings are not open to the public.
4. Informal proceedings cause less polarization of the parties.
5. Arbitrators that are selected by the parties are usually more knowledgeable on the subject they are going to arbitrate than lay jurors. It takes less time to educate arbitrators than lay jurors.

Disadvantages of Arbitration

1. There is only limited right of review of arbitrators' awards.
2. If a party fails to comply with the award, a court action is needed to enforce it.
3. The parties must pay for the services of the arbitrators.

Mediation

Mediation is a dispute resolution process whereby a trained mediator works with the parties and their attorneys (if the parties are represented by attorneys) to attempt to find a solution to the dispute that will be acceptable to all parties and achieve as many of the goals of the parties as possible.

The basic difference between mediation and other forms of Alternative Dispute Resolution such as a settlement conference or arbitration is that the latter two are adversarial in nature whereas mediation is a process where all the parties work together to try and achieve a settlement.

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Advantages of Mediation

1. Mediation can often be held within a few days or weeks after a dispute has arisen.
2. Mediation, too, is private and not open to the public.
3. Mediation allows the parties to express their point(s) of view directly to each other. The parties can talk to each other without going through an arbitrator or judge. For example, a dentist can ask questions of their patient.
4. Attorney's fees can be reduced or avoided entirely if the mediation results in a settlement.
5. Mediators are often trained in techniques valuable in overcoming stalemate or impasse in negotiations.
6. The parties themselves are empowered to reach their own agreement rather than having one imposed on them by an outside source such as a judge or arbitrator.

Disadvantages of Mediation

1. Parties must pay for the services of a mediator. (The cost is less than paying attorney fees.)
2. If a settlement is not reached at mediation, another dispute resolution process such as arbitration or litigation may be required to resolve the dispute.
3. If a party fails to comply with a mediated settlement, then court action or arbitration will be needed.

If your insurance company or your attorney do not talk to you about Alternative Dispute Resolution, ask them to explain possible ways to settle your claim without going to court.

Chapter 8

Ten Case Studies Concerning Risk Management

We have included actual case studies in this manual to show:

1. The many kinds of allegations that can be made in a lawsuit, even though some of the allegations can not be proven at the time of trial.
2. The number of expert witnesses that were produced, by both the plaintiff and defendant, to testify, and the credentials of those witnesses.
3. The number of days that a dentist had to be away from his practice to be present at the trial.
4. That lawsuits can be won if the dentist has good records and credible testimony by his experts.
5. How injuries can be exaggerated by the plaintiff.

We have withheld the names of the plaintiffs and the defendants to protect the privacy of the parties involved in the lawsuits. Names of the experts and attorneys involved are shown because their names are part of the court records which are open to the public and their names can be used without their permission.

In each case study the participants are listed, the facts are summarized, the length of time it took the jury to reach a decision is noted, and the demand, offer, and verdict are cited. In addition, a specific questionnaire is offered to help you become more familiar with the legal practice as it refers to dentistry.

The following list of Causes of Action can assist you in answering the quiz questions for each case study.

1. Alteration of Records
2. Battery
3. Fabrication of Records

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4. False Advertising
5. Intentional Concealment
6. Intentional Misrepresentation
7. Lack of Informed Consent
8. Misrepresentation of Credentials
9. Negligence
10. Negligent Misrepresentation
11. Practicing Without Proper License
12. Treatment Below Standard
13. Treatment Provided by Assistant
14. Sexual Harassment

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Case Study No. 1

Parviz Doe v. Gerald Doe and a Dental Group

Plaintiff's Attorney:	Ira N. Katz, Beverly Hills
Defendant's Attorney:	Brian P. Kammel
Plaintiff's Experts:	David R. Milstein, M.D. (Opthamologist) Gerald Stern, D.D.S. (Dentist)
Defendant's Expert:	Martin D. Levine, M.D. (Neurologist) John D. Hofbauer, M.D. (Opthamologist) Donald Leake, M.D. D.M.D. (Oral/Maxillofacial Surgeon)

Trial Judge: Hon. Maryann Murphy

Facts of the Case

Plaintiff, a 42-year old graphic designer, presented to defendant dentist for a root canal procedure, crown, and bridge preparation and extractions.

Plaintiff alleged that he suffered a left-sided facial paralysis as a result of multiple dental injections administered during the procedures.

Plaintiff contended that he received an excessive number of dental injections; that the injections were negligently administered; that the injections caused injuries to all five branches of this facial nerve; that multiple root canals and a multi-unit bridge were negligently performed, and that the defendant dental group extracted teeth unnecessarily.

Defendants contended that the dental injections were performed within the standard of care; that it was not anatomically possible to strike all five branches of the facial nerve based on the location of the dental injections; that the root canal treatment and extractions were necessary and performed within the standard of care, and that making crown and bridge adjustments following the seating of the bridge did not constitute a substandard manner of performance.

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The jury was out two and one-half hours after a seven-day trial.

Special Damages:	Medical \$4,831
Loss of Wages:	\$9,940
Demand:	\$29,000
Offer:	\$5,001
Verdict: Defendant—No damages were awarded to the plaintiff.	

Questions for Case Study No. 1

1. What three causes of action were pleaded in the complaint?
2. If the plaintiff alleged that he received an excessive number of injections, should the plaintiff have told the jury the exact number of injections?
3.
 - (a) Nine jurors voted that there was no negligence. Three jurors voted that there was negligence.
 - (b) Eleven jurors voted that there was informed consent. One juror voted that there was no informed consent.
 - (c) Twelve jurors voted that there was no battery.

Do you believe that the three jurors who voted there was negligence believed:

- (1) The dentist extracted teeth unnecessarily?
- (2) There were excessive injections?
- (3) Root canals and the multi-unit bridge were negligently performed?
- (4) It was anatomically possible to strike all five branches of the facial nerve?

Note: Without more detailed information given by the jurors, the author knows that it is difficult to answer the questions with certainty.

3. **Association of Independent Dentists**, 100 F.T.C. 518 (1982) (consent order). An association of dentists in Pueblo, Colorado, agreed, among other things, not to restrict its members from truthfully advertising. This agreement

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Answers to Questions for Case Study No. 1

1. The three causes alleged were
 - (a) Negligence.
 - (b) Lack of informed consent.
 - (c) Battery.
2. The plaintiff should have explained what he considered excessive. What may be excessive to one juror may not be excessive to another juror.
3. (1), (2), (3) The three jurors that voted there was negligence probably believed that the dentist was guilty on all three allegations. Either attorney had the right to ask the jurors to be specific as to how they voted. (4) Probably not but you don't know how many injections were made and where the needle was placed for each injection.

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Case Study No. 2

Elizabeth Doe v. Duane Doe, D.D.S.

Plaintiff's Attorney:	Charles M. Finkel
Defendant's Attorney:	Steven M Maslauski
Plaintiff's Experts:	Glen Roeder, D.D.S. (Periodontist) Rami Etessami, D.D.S. (Endodontist) Alfred E. Marohl, D.D.S. (Prosthodontist)
Defendant's Expert:	Irving S. Lebovics, D.D.S. (Prosthodontist)
Trial Judge:	Hon. Judith O. Stein

Facts of the Case

Plaintiff, a 53 year-old female, treated by the defendant, a prosthodontist, for five years. Plaintiff presented with serious pre-existing bite problems, periodontal disease, and previous prosthodontic work. Defendant performed a full-mouth reconstruction for the plaintiff.

A general dentist who worked in the defendant's office performed root canal treatments on 12 teeth. The root canals all failed and had to be redone by another dentist, as did at least nine crowns.

Plaintiff contends that the root canals and defendant's prosthodontic work were below standard, that the failed root canals and prosthodontic work caused the need for subsequent dental work and implants, and that the general dentist was the defendant's agent.

Defendant contended that his prosthodontic work complied with the standard of care; that while the root canals were admittedly below the standard of care, he promptly recognized this and arranged for a second opinion, and that he was not responsible for the failed root canals since the general dentist was an independent contractor.

The general dentist was dismissed on a motion for summary judgment based on a statute of limitations defense. (The lawyer concentrated on the principal dentist and failed to file a timely lawsuit against the general dentist.)

Plaintiff's attorney asked the jury to award specials plus \$100,000 for pain and suffering.

The jury was out for 6.5 hours after an eight-day trial.

Injuries: Plaintiff required a second full-mouth reconstruction. She also claimed emotional distress.

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Specials: Medical \$34,000

Comment: Defendant's dentist refused consent to settle over the objections of his attorney and insurance company.

Demand: Defendant rejected a \$27,000 arbitration award to plaintiff.

Offer: No offer was made.

Verdict: Plaintiff verdict, \$34,000 (economic damages); \$100,000 (non-economic damages).

Questions for Case Study No. 2

1. What were the two allegations in the complaint?
2. Was the general dentist an employee or an independent contractor?
3. Why was the general dentist dismissed from the lawsuit and therefore did not have to contribute toward the payment of damages?
4. Do you believe the jury applied the Respondent Superior theory that made the general dentist an agent of the defendant dentist?
5. Because all 12 root canals failed and had to be done over, do you believe the general dentist was negligent in doing the root canals?
6. The plaintiff called three experts to testify. The defendant called only one expert. Do you think that the defense should have called three experts?

Answers to Questions for Case Study No. 2

1. Negligence and failure to meet standards.
2. The jury found both negligence and failure to meet standards so they probably considered the general dentist an employee of the prosthodontist.
3. The general dentist was dismissed because the plaintiff's attorney goofed. He waited until after the one-year statute of limitations expired before he filed his lawsuit against the general dentist.
4. The jury probably concentrated on the 12 root canals that had to be done over so they probably imputed the negligence of the general dentist to the prosthodontist.
5. The prosthodontist admitted the root canals were not done properly and therefore the general dentist was guilty of negligence.
6. The total verdict of \$134,000 is considered a big verdict in a dental malpractice case. The defense attorney probably had a difficult time in finding defense experts that were willing to testify. More experts might have mitigated the damages.

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Case Study No. 3

Maria Doe v. Kam Doe, D.D.S. and a Dental Clinic

Plaintiff's Attorney:	Sherre C. Strum
Defendant's Attorney:	Stephen Hewitt
Plaintiff's Experts:	Ernest Jan Davidian, D.D.S. (Orthodontist) Robert L. Boyd, D.D.S. (Orthodontist/Periodontist)
Defendant's Expert:	Neal Murphy, D.D.S. (Orthodontist/Periodontist)
Trial Judge:	Stephen D. Cunnison

Facts of the Case

Female plaintiff, age 19, was treated by defendant dentist employed by a dental clinic.

Defendant dentist, a general dentist, went to dental school in India. He falsely represented himself as an orthodontist. He placed advertisements in telephone books under the heading of "orthodontist" and falsely stated he was an American Association of Orthodontists member.

Defendant dentist had no dental license to practice in the United States nor any formal orthodontic training. He had worked as a dental assistant for an orthodontist in two other states for approximately five years, until the orthodontist had his license revoked.

Defendant dentist's partners at a Dental Center thought the defendant dentist was an orthodontist, as did his dental assistants.

After treatment by defendant dentist and his assistants, plaintiff had root resorption and huge spaces between her teeth. Plaintiff was retreated by an orthodontist, but needed crowns on her teeth to close the spaces.

Plaintiff contended that defendant dentist had fraudulently misrepresented that he was an orthodontist in order to induce plaintiff to pay him for orthodontic treatment; that the treatment was negligently performed, and that defendant dentist's assistant had provided most of plaintiff's treatment.

Plaintiff also contended that the brackets and wires were placed on her teeth in the wrong position; that an archwire was placed in a

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headgear tube; that her treatment records were both fabricated and altered; that two upper teeth should never have been extracted, and that the plaintiff needed to have crowns on her teeth in order to close the spaces left between her teeth after defendant dentist's treatment.

Defendant dentist contended that there was no negligent treatment; that he held himself out as a general dentist who also did orthodontic treatment; that there was simply a problem of semantics, i.e. "orthodontist" versus "orthodontics," and that his dental assistants did not render treatment to patients.

Defendant dentist further contended that as to the two upper bicuspid extractions, plaintiff decided on her own to have defendant dentist's partner remove them; that plaintiff was not damaged in any way, and that the plaintiff's condition was not due to his treatment, but rather to that of some other dentist. At trial the defendant dentist admitted to altering some of plaintiff's records.

Injuries: Plaintiff's doctors testified that she had lost two teeth, had lost the ability to have a good orthodontic result functional and aesthetic, had permanent TMJ problems; needed at least ten crowns on her teeth; had residual large spaces between the teeth with the need for crowns now and in the future, and had a TMJ condition which caused the plaintiff headaches, ear pain, and numbness on one side of her face.

Dr. Murphy, defense expert, testified that the plaintiff had a good orthodontic result and suffered no damages. He also testified that the plaintiff had large spaces between her teeth which were a periodontal problem which could lead to loss of teeth.

The jury was out for 5.5 hours after a 12-day trial.

Special Damages: Future medical \$12,500 for crown and bridge work.

Demand: Plaintiff attorney asked jury to award \$250,000.

Comment: Formal demand before trial: \$96,000 raised to \$150,000 at the time of trial.

Offer: \$12,500 raised to \$45,000, then \$60,000, before opening statements.

Verdict: \$204,000 against both defendants.

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Questions for Case Study No. 3

1. What were the allegations in the complaint? (Hint: there are five. Check your list of causes of action.)
2. Was there negligence?
3. Was there deceit?
4. Was there fraud?
5. The dentist had no license. Do you think the clinic did a background or credentials check?
6. Was the individual dentist an employee as opposed to a contractor?
7. Do you believe the negligence of the individual dentist was imputed to the clinic?
8. Do you believe the dental records were altered?
9. Do you believe the defendant's expert was entirely honest in his testimony?

Answers to Questions for Case Study No. 3.

1. The jury found both defendants guilty of
 - (a) Intentional concealment.
 - (b) Intentional misrepresentation.
 - (c) Negligence.
 - (d) Lack of informed consent.
 - (e) Negligent misrepresentation.
2. Yes.
3. Yes.
4. Yes.
5. If the dental clinic had checked with the Board of Dental Examiners they would have been advised that he did not have a license. No further credential check would have been necessary.
6. Yes, they were employed by the clinic.
7. The negligence of the individual dentist was imputed to the clinic.
8. The clinic admitted the records were altered.
9. It is highly unlikely that the expert's testimony was entirely honest. (At least the jury did not believe him.)

RISK MANAGEMENT FOR DENTISTS

Case Study No. 4

Karaoet Doe vs. a Dental Group, a dentist, and a dental assistant

Plaintiff's Attorney:	Richard J. Basmajian
Defendant's Attorneys:	Thomas McAndrews for dentist William C. Haggarty for den- tal group and dental as- sistant
Plaintiff's Experts:	Cheri Lewis, dentist Diane Blum, dental assistant Steven Simons, pulmonologist
Defendant's Experts:	None
Trial Judge:	Coleman Swart

Facts of the Case:

Plaintiff, a 50 year-old, unemployed male, went to the Dental Group for a post and crown procedure. The plaintiff aspirated the post while it was being placed by a registered dental assistant.

Surgery was necessary to remove the post and dental filling.

The Dental Group claimed that the dentist supervised the dental assistant. The dentist said that he did not supervise the dental assistant.

Plaintiff claimed the Defendant's failure to maintain control of the post constituted negligence and caused the plaintiff pain, suffering, anxiety, and surgery.

Defendants argued a post falling into the throat is a risk of the procedure. The post was tried in an appropriate manner.

The jury was out for three hours after a four-day trial.

Injuries: Aspirated dental post. Treatment: Lobectomy of the right lung. Residual scarring.

Demand: \$185,000

Offer: \$100,000

Verdict: \$177,100 against the Dental Group and dental assistant: \$2,100 economic and \$175,000 non-economic. The jury did not

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believe that the dentist was negligent and they returned a defense verdict in favor of the dentist.

Questions for Case Study No. 4

1. What were the allegations against the Dental Group and the dental assistant?
2. Was the dentist guilty of any negligence?
3. Was the dental assistant guilty of negligence?
4. Was the dental group negligent?
5. Even if dropping the post was a known risk of the procedure, was the dental assistant guilty of negligence in dropping the post?

Answers to Questions for Case Study No. 4

1. Allegations were negligence and failure to meet the standards of care.
2. The jury did not hold the dentist guilty of negligence. Evidently the jury accepted the dentist's word that he was not supervising the dental assistant.
3. The jury held that the dental assistant was guilty of negligence for dropping the post in the patient's throat.
4. The negligence of the dental assistant was imputed to her employer, the Dental Group.
5. The jury believed the dropping of the post constituted negligence on the part of the dental assistant.

RISK MANAGEMENT FOR DENTISTS

Case Study No. 5

Kathy Doe Vs. Dentist #1, Dentist #2, and Dental Corporation.

Plaintiff's Attorney:	John C. Torjesen
Defendant's Attorneys:	for Dentist #1, Henry Walsh for the Dental Corporation, Alan Templeman
Plaintiff's Experts:	Judy Alexandre, LCSW Therapist Carol Wadsworth, MCFF, Therapist
Defendant's Expert:	John A. Nightengale, Psychologist
Trial Judge:	Ken Riley

Facts of the Case:

Plaintiff, a 33 year-old woman, worked for the Defendants as a dental assistant. While receiving dental care from Dentist #1 at work, the plaintiff was sexually assaulted.

Plaintiff claimed that Dentist #1 sexually assaulted her, that the Defendants should not have been treating her without another assistant being present.

Defendant argued that while receiving the dental care, Plaintiff asked for the nitrous oxide to be turned up and joked sexually with him.

There was no assault because the Plaintiff consented.

The Plaintiff was negligent for not leaving once any undesired physical contact started.

The Plaintiff's injuries were exaggerated and pre-existing and she was malingering.

The judge instructed the jury that Dentist #1 would not be acting within the course and scope of employment for the Defendant Corporation at the time of any intentional tort.

The jury was out five hours after a 14-day trial.

Injuries: Post traumatic disorder with recurrent memories, paranoia, sleeplessness, headaches, irritability and abdominal pain.

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Medical Cost: \$6,944.50

Loss of Earnings: \$3,750

Demand: \$500,000

Offer: \$100,000 raised to \$200,000 after the second week of trial.

Verdict: \$825,000 compensatory damages.

Questions for Case Study No. 5

1. What were the allegations in the complaint?
2. Did the jury find Dentist #1 negligent?
3. Did the jury find Dentist #1 guilty of assault?
4. Did the jury find Dentist #1 guilty of an intentional tort?
5. Should Dentist #1 have had another female employee present when he administered nitrous oxide and performed dental treatment under anesthesia?
6. Was the Corporation guilty of any negligence under the theory of Respondent Superior?
7. Did the jury find the plaintiff guilty of contributory negligence?
8. Could the jury have awarded punitive damages?
9. Did Dentist #1 have coverage for his intentional (criminal) act?

Answers to Questions for Case Study No. 5

1. Allegations in the complaint were
 - (a) Negligence.
 - (b) Assault and Battery.
 - (c) Intentional tort.
2. The jury found Dentist #1 guilty of negligence.
3. The jury found Dentist #1 guilty of assault.
4. The jury found Dentist #1 guilty of an intentional tort.
5. The dentist should have had another female employee present when he administered nitrous oxide.
6. The judge ruled that Dentist #1 was not acting in the scope of his employment when he completed the intentional act so the Corporation could not be held guilty of negligence.

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7. The jury did not find the Plaintiff guilty of contributory negligence. The Plaintiff's attorney probably told the jury that the plaintiff was under the influence of anesthesia and did not have the capabilities of making a rational decision.
8. The jury could not have awarded punitive damage because the plaintiff did not ask for punitive damages. (This was a California case and because of a California statute it is difficult to prove punitive damages against a health care provider.)
9. Dentist #1 probably did not have coverage for his intentional act. Most insurance policies exclude assault and battery, intentional acts, and sexual acts.

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Case Study No. 6

Daniel Doe Vs. Irina Doe, A General Dentist

Plaintiff's Attorney:	Marvin S. Shebby
Defendant's Attorney:	David M. Hillings
Plaintiff's Expert:	Hugh M. Kopel, Pediatric Dentist
Defendant's Expert:	David M. Taylor, Pediatric Dentist
Trial Judge:	John R. Stanton

Facts of the Case

Plaintiff, a 2½ year-old boy, fell at home and injured his upper front teeth. His mother took him to a Dental Group for examination. The Plaintiff was advised to wait a few days and return for further evaluation. The minor Plaintiff returned to the Dental Group at which time he was seen by the general dentist.

In addition to the injured tooth, the Plaintiff had deep decay on two upper front teeth which required pulpectomies (root canals). The plaintiff was pre-medicated with diazepam and hydroxyzine to calm him down. The procedures were performed under local anesthetic. Throughout the procedure, the minor plaintiff was agitated, would not follow directions, and was moving about. Standard restraints were utilized, including hand restraints and a pediboard.

His throat was packed with gauze and a mouth prop was utilized to keep his mouth open. The dentist was able to complete the two pulpectomies and had placed two stainless steel crowns on the teeth when suddenly and unexpectedly, the minor plaintiff spit out the mouth prop and the gauze and swallowed one of the stainless steel crowns. He was not coughing or giving any indication that the crown had been aspirated into his lung. It was assumed that it had been swallowed.

The dentist completed treatment by extracting the injured tooth and the plaintiff was discharged to his mother. They were referred to a medical doctor that day, who took an x-ray and diagnosed that the crown had not been aspirated into the lung but rather swallowed.

The mother was advised the crown would pass. Two days later the minor plaintiff developed a high fever and was taken to the emer-

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gency room of a nearby hospital where further testing revealed that the crown had in fact been aspirated into the lower right lung. The plaintiff was transferred to another hospital where, under general anesthesia, the crown was successfully removed during a bronchoscopy procedure. He developed pneumonia and remained in the hospital for five days.

Plaintiff claimed the dentist was negligent for continuing to treat the child who was uncontrollable.

The standard of care required that she either not initiate treatment under the circumstances or should have stopped treatment and referred him to another office or facility which used general anesthesia.

Defendant argued her treatment was appropriate and within the standard of care. Although the Plaintiff was rather agitated during the dental treatment, this was not unusual for a child his age. At least half of all minor patients were as difficult. All appropriate precautions were utilized to prevent a crown from being swallowed. The swallowing of a stainless steel crown is a known risk of dental treatment of minors.

Every pediatric dentist has experienced such an occurrence.

The jury was out one hour after a 2.5-day trial.

Injuries: Emotional distress—fear of doctors and hospitals.

Medical Cost: The Medi-Cal lien of \$3,659 had been paid.

Demand: \$12,500

Offer: \$2,999

Verdict: Defense verdict—dentist was not negligent.

(Before the case proceeded to trial, the medical doctor settled with the minor plaintiff for \$12,500 for his misdiagnosis of the x-ray.)

Questions for Case Study No. 6

1. Should the general dentist have referred the minor patient to a specialist to do the root canals?
2. Should the procedure have been done using a local anesthetic?
3. Were the restraints, hand restraints, and pediboard adequate?
4. Was packing the throat with gauze and using a mouth prop considered standard of care for the procedure being done?

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5. Did the dentist meet the standard of care in referring the patient to a medical doctor for an x-ray?
6. In your opinion, does the evidence presented indicate that the minor patient was uncontrollable and should have been referred to another office or hospital for general anesthetic?
7. Was the defense attorney correct in alleging that every pediatric dentist has experienced such an occurrence?
8. Was the jury, in your opinion, right in finding the dentist not guilty of any negligence?
9. In your opinion should the minor plaintiff have been awarded damages because he swallowed the crown?

Answer to Questions for Case Study No. 6

Note: The jury did not answer all of the questions that have been asked in this quiz. The jurors voted 11 to 1 that the dentist was not guilty of negligence and that he met all the standards. Jurors do not always understand the standards in a medical malpractice or dental malpractice case. Some lawyers, judges, and other professionals believe that only professionals should serve on juries in malpractice cases.

1. There will probably be a difference of opinion among dentists as to whether the patient should have been referred to a specialist. Evidently the jury was satisfied that a general practitioner could do all of the procedures necessary.
2. Again, there will probably be a difference of opinion. The jury believed that local anesthetic was adequate. Some dentists probably believe the patient should have been given a general anesthetic because he was difficult to control combined with the nature of the procedure.
3. The restraints were probably adequate because the patient was not combative.
4. The jury believed the gauze and mouth prop were adequate. What precautions would you have taken?
5. The dentist did meet the standard in referring his patient to a medical doctor.
6. The jury did not believe the minor patient was uncontrollable.

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7. Probably not. The key word is *every*. There are probably many pediatric dentists who have placed a crown without letting the patient swallow one.
8. The dentist had consent. Swallowing a crown is one of the risks of this procedure.
9. The minor plaintiff incurred medical expense in having the crown removed from his lung. The jury probably did not award damages because he received \$12,500 from the medical doctor.

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Case Study No. 7

Cheree Doe vs. A Dental Service and An Individual Dentist

Plaintiff's Attorney:	Sheree C. Strum
Defendant's Attorney:	Mark P. Poloquin
Plaintiff's Expert:	Victor W. Mintz, D.D.S., Prosthodontist
Defendant's Expert:	John J Lytle, M.D., D.D.S., Oral/Maxillofacial Surgeon
Trial Judge:	Arnold H. Gold

Facts of the Case

Plaintiff, a 26-year-old supervisor of a chain drugstore, presented herself to the Dental Service for a checkup. The Defendant dentist told her that she needed an extraction of her lower right wisdom tooth. Defendant extracted the tooth, and the plaintiff has had loss of taste and complete numbness of the tongue, floor of the mouth, and gums since the time of the extraction.

The General Dentist who was sued graduated from dental school in Indonesia, where he had extracted only three wisdom teeth. He practiced dentistry in Indonesia for four months, then came to the United States, where for ten years he did no dentistry. He worked a short time in a bank and then became licensed to practice dentistry in the U.S. He did not attend any program which would lead to his being certified in oral surgery or any dental specialty. He never took any course in oral surgery in the U.S. He did take one course in making dentures, and had attended seminars in HIV and dental office management from the defendant Dental Service.

Plaintiff contended the Dental Service was negligent in hiring and supervising the individual dentist; that the general dentist negligently extracted plaintiff's lower right wisdom tooth; that the negligent extraction severed the plaintiff's lingual nerve, and that her injury was permanent.

Dr. Mintz, the plaintiff's expert, testified that the Dental Service was negligent in hiring and supervising the general dentist and in allowing him to extract wisdom teeth rather than refer the plaintiff to an oral surgeon. He also testified that the general dentist negligently sev-

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ered the plaintiff's lingual nerve, which resulted in permanent loss of taste and complete numbness to the tongue, floor of the mouth, and gums.

The defendant Dental Service contented that the dentist was adequately trained in oral surgery by one of its other employees, a general dentist. Defendants contended that the dentist had not been negligent in extraction of the plaintiff's lower right wisdom tooth, but admitted that the plaintiff had severe damage to her right lingual nerve. Dr. Lytle, the defendant's expert, examined the plaintiff and testified that although she had complete numbness from damage to the lingual nerve, there was no negligence on the part of the defendants because the nerve had been stretched, not severed.

He also testified that he could not state whether or not the injury was permanent.

The jury was out 1.5 days after an eight-day trial.

Demand: \$180,000

Offer: \$60,000 but raised to \$100,000 on first day of trial.

Plaintiff Awarded: \$115,000 plus cost of trial.

Questions for Case Study No. 7

1. Was the Dental Service negligent in not checking the credentials of the dentist from Indonesia?
2. Was the Dental Service negligent in hiring the dentist from Indonesia?
3. Was the Dental Service negligent in not referring the patient to an oral surgeon?
4. Was the Dental Service negligent in permitting the dentist from Indonesia to extract the wisdom tooth?
5. Was the dentist negligent in severing or damaging the lingual nerve?
6. Did the plaintiff's attorney make an error in selecting a prosthodontist to be his expert?

RISK MANAGEMENT FOR DENTISTS

Answers to Questions for Case Study No. 7

1. The Dental Service was negligent in not checking their employee's credentials before permitting him to do oral surgery.
2. The Dental Service was not negligent in hiring the dentist. They could have hired him to do some minor dental procedures and arranged for him to get better training.
3. The Dental Service should have referred the patient to an oral surgeon if they did not have a dentist in their employment that was competent to do the extraction.
4. The Dental Service was negligent in permitting the dentist to extract the wisdom tooth.
5. The dentist was negligent in damaging the lingual nerve.
6. Most attorneys knowing that the defense attorney had selected a medical doctor/oral surgeon to be his expert would have retained an oral surgeon rather than a prosthodontist.

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Case Study No. 8

John Doe vs. Family Dental Clinic

Plaintiff's Attorney:	Jay Jeffrey Long
Defendant's Attorney:	Thomas McAndrews
Plaintiff's Experts:	John Evans, General Dentistry Richard Haskel, Cardiology Ronald Thommarson, Internal Medicine
Defendant's Experts:	John Vyden, Cardiology Richard Nalin, General Dentistry
Trial Judge:	John R. Stanton

Facts of the Case

A 49 year-old disabled male received dental care at the Family Dental Clinic for a period of approximately three years. During that time, he reported no significant history which would require prophylactic antibiotics.

Shortly after a visit involving a root canal, he contracted bacterial endocarditis. He then underwent two surgeries for replacement of the mitral valve.

Plaintiff claimed as a result of the defendant's failure to take a complete history and pre-medicate the patient for his heart condition, he was permanently precluded from working full time. He further sought damages for pain and suffering due to his inability to maintain his previously active lifestyle.

Defendants argued that the health history was complete and the questionnaire completed by the Plaintiff indicated no heart condition such that prophylactic antibiotics would be necessary. The bacterial endocarditis was a result of something other than dental care in that there was an inordinate delay between the root canal and the infection.

The jury was out 1.5 days after a seven-day trial.

Injuries: Bacterial endocarditis

Treatment: 2 surgeries

RISK MANAGEMENT FOR DENTISTS

Medical Cost: \$80,000

Loss of Earnings: \$160,000

Demand: \$150,000

Offer: None

Verdict: 10-2 for the Defense; no payment.

Questions for Case Study No. 8

1. Do you believe that the dentist's questionnaire helped him get a defense verdict?
2. Do you believe that the jury believed the dentist had a good medical history in his file?
3. Do you believe the dentist had good informed consent?
4. Do you believe the defense attorney proved by way of his experts that there was an inordinate delay between the root canal and the endocarditis?

Answer to Questions for Case Study No. 8

1. Definitely.
2. The jury believed that it was adequate.
3. Yes, and the fact that it existed and was current didn't give the jury anything to "hang their hat on."
4. Yes.

Note: With \$240,000 sought in damages, the dentist must have had a good chart and the defense attorney must have used his evidence wisely or the jury would have probably awarded something.

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Case Study No. 9

Lorraine Doe vs. Individual Dentist and a Dental Center

Plaintiff's Attorneys:	Robert Mann and Donald Cook
Defendant's Attorneys:	Gerald A. Edelstein, for Individual Dentist Mary E. Porter, for Dental Center
Plaintiff's Experts:	Mark L. Torbiner, D.D.S. (Dental Anesthesiologist) William Solberg, D.D.S. (TMJ)
Defendant's Experts:	John J. Lytle, D.D.S. (Oral Surgeon) John Pallasch, D.D.S. (Periodontist/Dental Pharmacologist)
Trial Judge:	Thomas Schneider

Facts of the Case

A 35-year-old catering truck driver underwent an alveolar block to anesthetize the lower left mandibular area in preparation for a bridge. Defendant, an individual dentist, administered the injection at Defendant Dental Center's office. Plaintiff suffered nerve damage.

Plaintiff contended that she suffered intense pain during the injection and asked the defendant dentist to stop; that he should have stopped the injection upon request; that the standard of care in administering such an injection is to withdraw, with or without the patient's request, if the needle hits a nerve, which should be readily observable through the patient's involuntary reaction, and that the defendant dentist's failure to withdraw was a battery.

Defendant dentist contended that nothing unusual happened during the injection, which lasted about one minute. He first realized that the plaintiff was having a bad reaction only after he completed the injection.

Defendant dentist's experts testified that the injection should be continued even if the patient requests the dentist to stop, unless the pa-

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tient begins thrashing around in the chair so violently that there is a danger of the needle breaking. That there is no reason to withdraw if the needle hits a nerve.

The jury was out six hours after a four-day trial.

Injuries: Plaintiff's doctors testified that she suffered nerve damage which resulted in permanent numbness in the left lower lip. Plaintiff also claimed continuing headaches.

Special Damages: No evidence was submitted but the plaintiff claimed extensive lost earnings as a result of her inability to drive a catering truck.

Demand: \$210,000

Offer: Defendant offered to waive court cost.

Defendant Dental Center settled shortly before trial for \$40,000. The jury was not aware of the settlement.

Verdict: Plaintiff was awarded \$125,000 in general damages. Plaintiff was awarded \$10,000 for loss of earnings.

Questions for Case Study No. 9

1. What were the allegations in the complaint?
2. Do you believe the dentist was negligent in hitting the nerve?
3. Do you think the dentist should have terminated the injection when the patient requested that he stop?
4. Do you think the dentist should have been aware when he struck the nerve?
5. Do you believe the Dental Center was fair in settling out from under the dentist before trial?
6. Do you believe the jury held the dentist guilty of battery because he would not withdraw the needle when the patient ask him to stop?

Note: The plaintiff prevailed on both battery and negligence causes of action.

Answers to Questions for Case Study No. 9

1. Allegations
 - (a) Negligence.
 - (b) Below standard of care.
 - (c) Battery.
2. The jury evidently believed the dentist was trained to give injections without hitting a nerve.
3. The jury gave the award based on battery, therefore they must have believed the dentist should have withdrawn the needle when the patient asked him to stop.
4. The experts probably testified that the dentist should have known when he struck a nerve.
5. The Dental Center had nothing to say about the settlement. The clinic's dental malpractice policy gave the insurance company the right to make the decision about settlement.
6. Because the jury made it clear that they believed there was battery, they probably thought the dentist should have withdrawn the needle when the patient made the request.

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Case Study No. 10

Debbie Doe vs. Dentist #1, Dentist #2, and a Dental Group

Plaintiff's Attorney:	Hayward P. LeCrone
Defendant's Attorneys:	Stephen L. Hewitt for Dentist #1 Jim Lew for Dentist #2 and Dental Group
Plaintiff's Experts:	Clayton Ching, D.D.S. John M. Ravin, Psychiatrist
Defendant's Experts:	J. Thomas Chess, General Dentist
Trial Judge:	Francisco Firmat

Facts of the Case

Plaintiff, a 42 year-old cosmetologist, went to a Dental Group complaining of a toothache. Dentist recommended a filling on upper front tooth no. 8 and a redo of crown work on the Plaintiff's lower teeth. Root canal treatment and crown preparation were started. On one visit, Plaintiff spent five hours at the office with impressions for bridges taken along with temporaries placed. Subsequently, in November, Plaintiff experienced difficulties with temporary dental work.

She obtained pain prescriptions and adjustments from the Group. She also consulted an outside dentist in December, permanent crown and bridgework delivered and permanently cemented on the lower left (T-18 through 20) and temporarily cemented on lower right (T-29 through 32). All work performed by Dentist #2. Afterwards, Plaintiff experienced multiple difficulties including severe pain and extreme sensitivity to hot and cold. She developed a periapical abscess on the upper front tooth no. 8.

Plaintiff refused to return to the Group for completion of treatment. She transferred her care to Dr. Clayton Ching (Ching later became one of her expert witnesses). Between January and July, Dr. Ching redid all work performed by Dentist #2. Additional crown work and root canal therapy was necessitated by the negligent treatment. Plaintiff then sued Dentist #2 claiming all of his work was below standard of care.

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The pain and suffering he caused as well as additional treatment she required rendered Plaintiff a dental phobic.

Plaintiff sued the Group alleging Dentist #2 was their agent and that the dental Group's director, Dentist #1, was vicariously responsible for actions of Dentist #2.

Plaintiff claimed all of Dentist #2's dental treatment was negligent and below the standard of care. Faulty filling on upper front teeth 8 and 9 performed by Dentist #2 resulted in later periapical abscess necessitating root canal and crown work.

Negligent fitting of permanent crowns and bridges on the lower left and right with gaping open margins resulted in severe pain and sensitivity and required complete redo for this dental work including additional root canals.

Dentist #2 was the direct agent of the Dental Group and Dentist #1, because he was under their control.

Plaintiff rendered a dental phobic due to negligent treatment.

Defendant argued all of Dentist #2's dental treatment was proper and well within the standard of care. Filling on upper front tooth performed by Dentist #2 was justified and appropriately performed. There was no periapical abscess: root canal and crown work on the upper front tooth no. 8 was caused by palatal abscess behind the tooth which had nothing to do with dental treatment.

Plaintiff's crown and bridgework on her lower teeth, left and right side, had not been completed when Plaintiff terminated treatment with the Group.

The jury was out 25 minutes after a 10-day trial.

Injuries: Severe pain and extreme sensitivity to hot and cold, abscess of front tooth. All work had to be redone and additional crown work and root canal therapy due to negligent work.

Demand: \$46,000

Offer: None

Verdict: Defendant—no payment.

Questions for Case Study No. 10

1. What were the allegations in the complaint?
2. Considering that you have a very short period of time to evaluate a patient, would the fact that the patient was a cosmetologist give you any concern?

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3. Do you think her numerous complaints confused the jury? The jury deliberated for only 25 minutes—this should tell both you and the plaintiff about keeping a case as simple as possible.

Answers to Questions for Case Study No. 10

1. Negligence and Below Standard of Care.
2. Being a cosmetologist might tip you off that she might be a bit vain and expect too much in the way of treatment.
3. Probably.

Sample Letters

Sample Letter to Confirm Dentist's Discharge by a Patient

Dear Mr./Mrs./Ms. _____:

This will confirm our telephone conversation of _____
in which you discharged me from attending to your dental needs.

In my opinion your condition warrants further dental care and
treatment by another dentist.

I suggest that you employ another dentist without delay.

You may be assured that, at your request, I will furnish the dentist with information regarding the diagnosis and treatment that you have received from me.

Very truly yours,

_____, D.D.S.

The letter is written in business letter style on your practice stationery. It includes the date the letter is sent to the patient.
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Sample Letter to a Patient Who Fails to Keep an Appointment

Dear Mr. Mrs. Ms. _____ :

On _____ 19 __ , you failed to keep your appointment at my office. In my opinion, your condition requires continual dental treatment. If you so desire, you may telephone me for another appointment, but if you prefer to have another dentist attend you, I suggest that you arrange to do so without delay.

You may be assured that, at your request, I am willing to make your records available to another dentist.

The purpose of this letter is to let you know that I am concerned about you.

Very truly yours,

_____, D.D.S.

The letter is written in business letter style on your practice stationery. It includes the date the letter is sent to the patient.
--

RISK MANAGEMENT FOR DENTISTS

Sample Letter to a Patient Who Fails to Follow Advice

Dear Mr. Mrs. Ms. _____ :

At the time that you brought your son, Joseph, to me for examination this afternoon, I informed you that I was unable to determine the condition of his teeth and gums without an x-ray study.

I urge you to let me or another dentist, of your choice, to make an x-ray study as soon as possible.

Your neglect in not permitting a proper x-ray examination may result in serious consequences.

Very truly yours,

_____, D.D.S.

The letter is written in business letter style on your practice stationery. It includes the date the letter is sent to the patient.
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Sample Letter of Withdrawal from a Case

Dear Mr. Mrs. Ms. _____ :

I find it necessary to inform you that I am withdrawing from further professional attendance upon you for the reason that you have persisted in refusing to follow my advice and follow through with necessary treatment.

Since your condition warrants further dental attention, I suggest you place yourself under the care of another dentist without delay.

If you so desire, I shall be available to attend you for a reasonable time after you have received this letter, but in no event for more than 30 days. This should give you ample time to select a dentist of your choice.

With your approval, I will make available to your dentist your dental records and information regarding your treatment.

Very truly yours,

_____, D.D.S.

The letter is written in business letter style on your practice stationery. It includes the date the letter is sent to the patient.
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Glossary

ACTION A proceeding of a civil or criminal nature in a court of law.

AFFIDAVIT A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such an oath.

ASSAULT An intentional act which is designed to make the victim fearful and which produces reasonable apprehension of harm.

BATTERY The touching of one person by another without permission.

CIVIL ACTION A lawsuit brought by a private individual or group to recover money or property to enforce or protect a civil right, to prevent or redress a civil wrong. It differs from a criminal action in which the State prosecutes an individual for committing an offense against all the people.

CIVIL LAW The portion of American law which does not deal with crimes. That group of laws which governs relationships with one another.

COMMON LAW The legal traditions of England and the United States where part of the law is developed by means of decisions of the court.

COMPLAINT The written statement of a plaintiff in a civil action which sets forth his/her claims and commences the action.

CONSENT A voluntary act by which one person agrees to allow someone else to do something.

CRIMINAL LAW The division of law dealing with crime and punishment.

RISK MANAGEMENT FOR DENTISTS

DAMAGES Monetary compensation for one who has sustained loss, detriment, or injury to his person or property through the unlawful act, omission or negligence of another.

DEFAMATION The injury of a person's reputation or character by willful and malicious statements made to a third party. Defamation includes libel and slander.

DEFENDANT In a criminal case, the person is accused of committing a crime. In a civil suit, the party against whom the suit is brought demanding that he pay the other party legal relief.

DEPOSITION A sworn statement of facts made out of court which may be admitted into evidence if it is impossible for a witness to attend in person.

DISCOVERY Pre-trial activities of attorneys to determine exactly what evidence the opposing side will present if the case goes to trial. Discovery prevents attorneys from being surprised during the trial and facilitates out-of-court settlement. Since discovery is variation from the way cases are usually tried, the rules for its use are very strict.

EMERGENCY A sudden unexpected occurrence or event causing a threat to life or health.

EXPERT WITNESS One who has special training, experience, skill, and knowledge in a relevant area, and who is allowed to offer an opinion as testimony in court.

GOOD SAMARITAN One who sees a person in imminent and serious peril. Cannot be sued for negligence, as a matter of law, in attempting to treat, provided the treatment is not recklessly or rashly made, and without expectations of compensation.

HABEAS CORPUS A writ which lays the basis for an action to determine legality of custody or confinement of a person.

HARM/INJURY Any wrong or damage to another, either to the person, to rights, or to property.

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LIABILITY The condition of being liable or responsible either for damages resulting from an intentional tort or a negligent act, or for the discharging of an obligation or the payment of some indebtedness.

LIBEL A false or malicious writing that is intended to defame or dishonor another person and is published so that someone besides the one defamed will observe it.

LICENSE A permit from the State allowing certain acts to be performed, usually for a specific period of time.

LITIGATION A trial in court to determine legal issues, rights, and duties between two parties to the litigation.

MALPRACTICE Professional misconduct, improper discharge of professional duties, or failure to meet the standard of care of a professional which resulted in harm to another.

NEGLIGENCE Carelessness, failure to act as an ordinary prudent person, or action contrary to what a reasonable person would have done.

PLAINTIFF The party to a civil suit who brings the suit seeking damages or other legal relief.

PRIVILEGED COMMUNICATION Statement made to an attorney, physician, spouse, or anyone else in a position of trust; because of the confidential nature of the information, the law protects it from being revealed even in court.

RES IPSA LOQUITUR “The thing speaks for itself.” A doctrine of law applicable to cases where the defendant had exclusive control of the thing which caused to harm and where the harm ordinarily could not have occurred without negligent conduct. Normally, the plaintiff must prove the defendant’s liability. But, when involved, the defendant must prove himself not responsible for the harm.

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RESPONDENT SUPERIOR “Let the master answer.” This maxim means that a master is liable in a certain case for the wrongful acts of his servant, and a principle for those of his agent.

SLANDER An oral statement made with intent to dishonor or defame another person when made in the presence of a third person.

STANDARD OF CARE Those acts performed or omitted that an ordinary prudent person would have performed or omitted. It is a measure against which a defendant’s conduct is measured.

STATE STATUTE Statutory law—a declaration of the legislative branch of government having the force of law.

STATUTE OF LIMITATIONS A legal limit on the time one has to file suit in civil matters, usually measured from the time of the wrong or from the time that a reasonable person would have discovered the wrong. Proceedings after such time are subject to be dismissed.

SUBPOENA A court order requiring one to come before the court to give testimony.

SUBPOENA DUCES TECUM Requires parties or witnesses to bring to court or to a deposition any relevant documents that are under the party or witness’s control.

SUIT Court proceeding where one person seeks damages or other legal remedies from another. The term is not usually used in criminal cases.

SUMMONS An official notification to the defendant that an action has been filed against him, and that he is required to appear, on a day named, and answer the complaint. (Physical appearance is not necessary. The attorney must file an answer.)

TESTIMONY The statements of a competent witness, on oath or affirmation, before a judicial officer or before a tribunal.

TORT A civil wrong. Torts may be intentional or unintentional.

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WAIVER The intentional or voluntary relinquishment of a known right.

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